118-241

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 252.

MARIE P. EVANS AND WILLIAM R. EVANS, PLAINTIFFS IN ERROR,

vs.

MRS. MARY A. PIKE, WIDOW OF WILLIAM S. PIKE, DECEASED, AND NATURAL TUTRIX OF THE MINOR GERTRUDE D. PIKE; JOHN H. PIKE; EMMA C. PIKE, WIDOW OF GRAY DOSWELL; WILLIAM S. PIKE, JUNIOR, AND MARY L. PIKE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED AUGUST 6, 1883.

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1 *Proceedings Subsequent to the Mandate of the Supreme Court of the United States. Entered and Filed May 14th, 1877.*

UNITED STATES OF AMERICA:

Circuit Court of the *the* United States in and for the Fifth Judicial Circuit and Eastern District of Louisiana.

Mrs. MARY P. EVANS and WM. S. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

Mandate Supreme Court.

Extract from the Minutes. April Term, A. D. 1877.

NEW ORLEANS, MONDAY, *May 14th*, 1877.

Court met pursuant to adjournment.
Present: Hon. Wm. B. Woods, circuit judge.

MARY P. EVANS *et al.*
vs.
W. S. PIKE *et al.* } 6494.

2 A writ of error having been taken in this cause to the Supreme Court of the United States, the mandate of said Court was this day filed, and on motion of Wm. Grant, attorney for Mrs. Evans *et al.*, ordered to be recorded, and it is as follows, viz:

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-six, the said cause came on to be heard before the said Supreme Court on the transcript of record, and was argued by counsel: On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs; and that the said Mary Ann H. Pike, widow, *& al.*, recover against the said plaintiff for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo.*

Motion to Strike Out Parts of Answer. Entered and Filed May 14th, 1877.

U. S. Circuit Court, District of Louisiana.

MARIE P. EVANS *et al.*
vs.
3 MARY ANN H. PIKE *et als.*, Substituted in Place of WM. S. PIKE. } No. 6494.

On motion of Wm. Grant, attorney for plaintiffs, it is ordered that defendants show cause on the 19th day of May, 1877, at 11 a. m., why the following portions of the answer in this case should not be stricken out:

1st. All that part of said answer setting up and alleging the act of donation through which plaintiff acquired title to the property in dispute from Ackley Perkins, to have been made in fraud of creditors, because the same is not admisssible as a defence in this action.

2d. So much of said answer as sets up the nullity of said act of of donation as void for the reason that the said Ackley Perkins gave away all he possessed, and did not retain sufficient for his maintenance, because the same is not admissible as a defence to this action.

3d. The plea of prescription of 1, 2, & 5 years, because such plea does not show to what matter it is applicable, but is directed
4 against plaintiffs' action, which is not prescribed by any term whatever, and because it does not present any issues.

4th. The answer, so far as it sets up title in defendant, by sheriff's deed of January 6th, 1866, because said deed is subsequent in date to the donation by which said Ackley Perkins conveyed the same property to plaintiff, and the answer does not set up any fact which in law makes such subsequent title superior to the prior title of plaintiff or divest such prior title.

Marshal's Return.

Received May 15, 1877, by the U. S. marshal, and on the 15th day of May, 1877, served a copy hereof on J. H. New, by having the same to him in person in this city.

(Signed) DAN. A. ROSE,
D'y Marshal.

Submission of Rule to Strike Out, &c.

Extract from the Minutes of Saturday, May 19th, 1877.

MARY P. EVANS
vs. } 6494.
W. S. PIKE.

5 The rule to strike out certain portions of the answer came on for hearing. William Grant, for plaintiffs in rule; Jno. H. New, for defendant in rule. And after hearing argument, the court took time to consider. The counsel to submit briefs within — days.

Transfer and Subrogation.

Extract from the Minutes. November Term, A. D., 1877.

NEW ORLEANS, *Monday, April 1st,* 1878.

Court met pursuant to adjournment.

Present, Hon. E. C. Billings, district judge.

MARIE P. EVANS
vs. } 6494.
WM. S. PIKE.

On motion of Charles T. Estlin, of counsel for Mrs. Julietta Perkins, it is ordered that the annexed transfer and subrogation of the

interest of said plaintiff be entered upon the minutes and filed in this suit.

U. S. Circuit Court, District of Louisiana.

MARIE P. EVANS *vs.* WM. S. PIKE.

6 For a good and valuable consideration, I, Marie P. Evans, plaintiff in the above suit, herein authorized by my husband, William R. Evans, have transferred, assigned, and conveyed, and do hereby transfer, assign, and convey, unto Mrs. Julietta Perkins, now in New Orleans, La., the said suit, together with all my right, title, and interest therein and thereto, and all the benefit and advantages that have been, or may be, derived therefrom, and any and all judgment, or judgments, that may be rendered therein, hereby subrogating her, the said Mrs. Perkins, to all my right and interest in and to said suit, and authorizing her to prosecute the same in my name, or in her own, as she may deem best.

New Orleans, April 1st, 1878.

(Signed) MARIE P. EVANS.
(Signed) WILLIAM R. EVANS.

Witnesses:
(Signed) A. BOUCHARD.
CHAS. M. EMERSON.

Motion and Order for Writ of Scire Facias. Entered and Filed January 20th, 1879.

Circuit Court of the United States for the District of Louisiana.

MARIE P. EVANS & WILLIAM R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

7 On motion of William Grant, attorney for the plaintiffs in the above-entitled cause, and suggesting that the defendant, William S. Pike, died *puis darrein continuance*, and that his succession has been opened in the second district court for the parish of Orleans, and that Mrs. Mary A. Huguet, by the judgment of said court, has been recognized as the widow, in community, of the said defendant, and as such entitled to the one undivided half of the community property left by him, and to the usufruct of the other one-half, she having accepted the same; and that John H. Pike, Emma C. Pike (Widow Doswell), William S. Pike, Jr., Mary L. Pike, and the minor, Gertrude D. Pike, represented by the said Mrs. Mary A. (Huguet) Pike, her tutrix; also by the judgment of said 2nd district court have been recognized as the sole and only heirs-at-law of their deceased father, the said William S. Pike, they having accepted the succession, and that such parties are the sole legal representatives of the defendant, William S. Pike, now deceased:

8 It is ordered by the court that a writ of *scire facias* be issued from this court, directed to the said Mrs. Mary A. Huguet, as widow in community aforesaid, and as tutrix of the minor,

Gertrude D. Pike, John H. Pike, Emma C. Pike (Widow Doswell), William S. Pike, Jr., and Mary L. Pike, requiring them to be and appear before this honorable court within twenty days from the service hereof, to defend in the above cause as the legal representatives of the defendant, William S. Pike, deceased.

January 20th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Writ of Scire Facias to Wid. W. S. Pike and as Tutrix, John H. Pike, Widow Doswell, Wm. S. Pike, Jr., and Mary L. Pike. Issued January 20th, 1879.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and District of Louisiana.

MARIE P. EVANS and WILLIAM R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

9 The President of the United States to the marshal of the United States for the district of Louisiana, Greeting:

Whereas a suit was lately depending in the said circuit court of the United States for the fifth circuit and district of Louisiana between Marie P. Evans and William R. Evans, plaintiffs, and William S. Pike, defendant, but before any final decree was entered therein the said William S. Pike departed this life, and that his succession has been opened in the second district court for the parish of Orleans, and Mrs. Mary A. Huguet, by the judgment of said second district court for the parish of Orleans, has been recognized as the widow in community of the said defendant, Wm. S. Pike, and as such entitled to the one undivided half of the property left by him and to the usufruct of the other one-half, she having accepted the same, and that John H. Pike, Emma C. Pike (Widow Doswell), Williams S. Pike, Jr., Mary L. Pike, and the minor, Gertrude D. Pike, represented by the said Mrs. Mary A. (Huguet) Pike, her tutrix; also by the judgment of the said second district
10 court have been recognized as the sole and only heirs-at-law of their deceased father, the said William S. Pike, they having accepted the said succession, and that such parties are the sole legal representatives of the defendant, William S. Pike, now deceased, as we have been informed, and the said plaintiffs have applied for a proper remedy in their behalf, and being willing that right and justice may be done agreeably to the acts of Congress in such case made and provided, we command you that you make known according to law to the said Mrs. Mary A. Huguet, as widow in community aforesaid, and as tutrix of the minor Gertrude D. Pike, John H. Pike, Emma C. Pike (Widow Doswell), William S. Pike, Jr., and Mary L. Pike, that they be before the honorable the circuit court of the United States for the fifth circuit and district of Louisiana within twenty days from the service of this writ, to show cause

why they should not be made parties defendant to said suit in their respective capacity, as aforesaid, and further to do and receive what the said court shall in that part consider.

And what you do in the premises you make due return
11 thereof, together with this writ, to our said court according to law.

Witness the Honorable Mor-ison R. Waite, Chief Justice of the Supreme Court of the United States of America, at New Orleans, this 20th day of January, A. D. 1879.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Marshal's Return.

Received January 22, 1879, by the U. S. marshal, and on the 23rd day of January, 1879, served true copies hereof on Wd. W. S. Pike, personally and as tutrix of the minor, Gertrude D. Pike; and on Emma C. Pike (Wid. Doswell) by handing to each a copy in person in the city of New Orleans; on the same day served a copy on Mary L. Pike by leaving the same at her domicile on Magazine street, near the corner of Robin street in the hands of Mrs. W. S. Pike, an adult person living in the house, the said Mary L. Pike being absent at the time of service, all of which I learned by interrogating the said Mrs. W. S. Pike; and on the 30th day of January served a copy on John H. Pike by handing the same to him in person in the
12 city of New Orleans; also, on the 6th day of February, 1879, served a copy on Wm. S. Pike, Jr., by handing the same to him in person in the city of Baton Rouge, La.

(Signed) W. G. ELLIOTT,
D'y Marshal.

Answer to Writ of Scire Facias. Filed March 3rd, 1879.

In the Circuit Court of the United States for the District of Louisana.

MARIE P. EVANS & WILLIAM R. EVANS
vs.
WILLIAM S. PIKE. } 6494.

On writ of *scire facias* against Mrs. Mary A. Pike, widow of the late William S. Pike, individually and as natural tutrix of her minor daughter, Gertrude D. Pike, and against John H. Pike, Emma C. Pike, widow of Gray Doswell, William S. Pike, Jr., and Mary L. Pike.

And now into said court come the said Mrs. Mary A. Pike, individually and as tutrix of her minor daughter, Gertrude D.
13 Pike; John H. Pike, Emma C. Pike, widow of Gray Doswell; William S. Pike, Jr., and Mary L. Pike, and for cause why they should not be made parties defendant to said suit show:

1. That by the death of the said William S. Pike, which occurred in the city of New Orleans on the 5th day of January, 1875, the said

suit abated, and the same cannot be revived and maintained against these appearers.

2. That on or about the first day of April last past the said Mary P. Evans transferred and conveyed and subrogated all her right, title, and interest in and to said suit to Julietta Perkins and divested herself, the said Mary P. Evans, of all her right, title, and interest therein in favor of said Mrs. Julietta Perkins, as will more fully appear by the transfer, conveyance, and subrogation aforesaid of record in this hon. court, and which is referred to as making part hereof; that said Julietta Perkins is a citizen of the State of Louisiana, and these appearers are likewise citizens of the same State, and this hon. court is without jurisdiction of the parties.

Wherefore your appearers pray the judgment of this hon. court of the sufficiency of the cause herein set forth, and that said writ
14 of *scire facias* be quashed, with costs.

(Signed) T. GILMORE & SONS,
For said Appearers.

John H. Pike, being duly sworn, says that the facts stated in the foregoing answer to the writ of *scire facias* are true.

(Signed) JNO. H. PIKE.

Sworn to and subscribed before me, this 3rd March, 1879.

(Signed) F. B. VINOT,
U. S. Comm'r.

Motion and Order. Answer to Scire Facias Fixed.

Extract from the Minutes. November Term, A. D. 1878.

NEW ORLEANS, SATURDAY, *March 8th*, 1879.

Court met pursuant to adjournment.

Present: Hon. Wm. B. Woods, circuit judge.

MARIE P. EVANS
vs. } 6494.
WM. S. PIKE.

On motion of Rouse and Grant, attorneys for plaintiff, it is ordered that the cause be set down for hearing on the return of defend-
15 ants to the writ of *scire facias*, on the 14th day of March, 1879, at 11 o'clock a. m., and that T. Gilmore and Sons, attorneys, be notified.

Cause Continued.

Extract from the Minutes of Friday, March 14th, 1879.

MARY P. EVANS
vs. } 6494.
W. S. PIKE.

Ordered that the hearing of the exception in above case lay over till to-morrow at 11 a. m.

Cause Continued.

Extract from the Minutes of Saturday, March 15th, 1879.

MARIE P. EVANS & *al.*
vs.
W. S. PIKE & *al.* } 6494.

By consent of counsel the matter of the return of the defendants to the writ of *scire facias* is continued till the 22nd instant at 11 a. m.

Submission of Defendants' Return to Writ of Scire Facias.

Extracts from the Minutes of Saturday, March 22nd, 1879.

Present: Honorable Edward C. Billings, district judge.

16 MARIE P. EVANS & *al.*
vs.
WM. S. PIKE. } 6494.

This cause came on to be heard on the defendant's return to the writ of *scire facias*, and, having been argued by Rouse and Grant and T. Gilmore and Sons, the court took time to consider.

Motion and Order for Leave to File an Amended Answer to Writ of Scire Facias. Entered and Filed March 25, 1879.

Circuit Court.

MARIE P. EVANS & Husband
vs.
W. S. PIKE. } 6494.

On motion of T. Gilmore and Sons, of counsel for Mrs. Mary H. Pike and others, it is ordered that they have leave to file an amended answer to the writ of *scire facias* issued against them herein.

Amended Answer to Scire Facias. Filed March 25th, 1879.

17 In the Circuit Court of the United States for the District of Louisiana.

MARIE P. EVANS & WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

And now into said court come Mrs. Mary A. Pike, widow in community of William S. Pike, in her individual capacity, as well as in her quality as natural tutrix of her minor daughter, Gertrude D. Pike, and John H. Pike, Emma C. Doswell, William S. Pike, Jr., and Mary Louise Pike, and with the leave of this hon. court file this their amended answer to the writ of *scire facias* issued against them in the above-entitled suit, and say that the said Julietta Perkins and these appearers at the time of the issuing out of the said writ of *scire facias* were, and continued to be, and still are, severally citizens of the State of Louisiana.

Wherefore said appearers pray as in their said original answer to said writ of *scire facias.*

(Signed) T. GILMORE & SONS,
For said Appearers.

18 John H. Pike, being duly sworn, says that the facts stated in the foregoing answer are true.

(Signed) JNO. H. PIKE.

Sworn to and subscribed before me this 25 March, 1879.

(Signed) F. B. VINOT,
U. S. Comm'r.

Let this amended answer be filed.
March 25th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Order Sustaininy Scire Facias, &c. Entered and Filed May 10th, 1879.

U. S. Circuit Court.

MARIE P. EVANS *et al.*
vs.
WILLIAM S. PIKE. } No. 6494.

This cause came on to be heard at this term on the opposition of Mrs. Mary A. Pike, individually and as natural tutrix of *his* minor daughter, Gertrude D. Pike, and of John H. Pike and others, to the writ of *scire facias,* and was argued by counsel. And the court, considering the law and the evidence to be in favor of the plaintiffs, it is ordered, adjudged, and decreed that said opposition be over-
19 ruled, and that this cause do stand revived against said legal representatives of William S. Pike, deceased, and that it do proceed to final judgment according to law.

May 10th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Order Extending Time, &c.

Extract from the Minutes. April Term, A. D. 1879.

NEW ORLEANS, *Tuesday, May 13th,* 1879.

Court met pursuant to adjournment.
Present: Hon. E. C. Billings, district judge.

MARIE P. EVANS *et al.*
vs.
WILLIAM S. PIKE *et al.* } 6494.

On motion of T. Gilmore and Sons, of counsel for Mrs. Mary A. Pike, individually and as natural tutrix of Gertrude D. Pike; John H. Pike, Emma Doswell, Mary Louise Pike, and William S. Pike, Jr., made parties defendant hereto, it is ordered that they have until the next term of this honorable court to make defence herein.

20 *Answer of Mrs. Mary A. Pike and the Heirs of W. S. Pike. Filed November 6th, 1879.*

In the Circuit Court of the United States for the District of Louisiana.

MARY P. EVANS & WILLIAM R. EVANS
vs.
WILLIAM S. PIKE, } No. 6494.

And now, by their undersigned attorneys, come Mrs. Mary A. Pike, widow of the late William S. Pike, and natural tutrix of her minor daughter, Gertrude D. Pike; John H. Pike, Emma C. Pike, widow of the late Gray Doswell; William S. Pike, Jr., and Mary Louisa Pike, made defendants herein, and reserving the benefit and advantage of the exceptions heretofore filed by them, and the benefit and advantage of all other legal exceptions, for answer, say: That they adopt as their own the answer and call in warranty, the amended and supplemental answer and plea of prescription herein filed by the said William S. Pike, in the same manner as if the same
21 were fully set forth herein. Wherefore they pray that plaintiffs' demand be rejected and dismissed, with costs, and for general relief.

(Signed) T. GILMORE & SONS.

Motion to Strike Out, &c., Assigned for Argument.

Extract from the Minutes. November Term, A. D. 1879.

NEW ORLEANS, TUESDAY, *January 20th*, 1880.

Court met pursuant to adjournment.
Present: Hon. Wm. B. Woods, circuit judge.

MARIE P. EVANS *et al.*
vs.
W. S. PIKE. } 6494.

On motion of Wm. Grant, attorney for plaintiff-, it is ordered that the motion to strike our certain parts of the defendants' answer be assigned for argument on the 23rd day of January, 1880, at 11 o'clock a. m., and that defendant- be notified thereof.

Motion and Order to Reassign, Motion to Strike Out, &c.

Extract from the Minutes of Friday, January 23rd, 1880.

MARIE P. EVANS *et al.*
vs.
W. S. PIKE. } 6494.

22 On motion of Wm. Grant, attorney for plaintiff-, ordered that the motion to strike out certain portions of the defendants' answer herein fixed for argument this day be reassigned for the 28th instant, at 11 a. m., and that T. Gilmore and Sons be notified thereof.

Order and Motion to Strike Out, &c., Continued.

Extract from the Minutes of Wednesday, January 28th, 1880.

MARIE P. EVANS *et al.*
vs.
W. S. PIKE, JULIETTA PERKINS Subrogated. } 6494.

In this case it is agreed that the motion to strike out certain portions of the defendants' answer be continued for hearing to 31st instant, at 11 a. m.

Hearing and Submission of Motion to Strike Out, &c.

Extract from the Minutes of Friday, January 31st, 1883.

MARIE P. EVANS *et al.*
vs.
W. S. PIKE, JULIETTA PERKINS Subrogated. } 6494.

23 This cause came on to be heard on the plaintiffs' motion to strike out certain portions of the defendants' answer, and, having been argued by the counsel for the respective parties, the court took time to consider.

Order on Plaintiffs' Motion to Strike Out, &c.

Extract from the Minutes of Monday March 1st, 1880.

MARIE P. EVANS *et al.*
vs.
MARY ANN H. PIKE *et als.* } 6494.

This cause came on to be heard on the plaintiffs' motion of May 11th, 1877, to strike out certain portions of the answer of the defendants, and was argued by the counsel of the parties respectively:

On consideration whereof it is ordered by the court that the first and second grounds of said plaintiffs' motion be sustained and accordingly that the following portions of the said answers of the defendants be striken out, to wit:

1st. All that part of said answer setting up and alleging the act of donation through which plaintiff acquired title to the
24 property in dispute from Ackley Perkins to have been made in fraud of creditors, because the same is not admissible as a defence in this action.

2d. So much of said answer as sets up the nullity of said act of donation as void, for the reason that the said Ackley Perkins gave away all he possessed, and did not retain sufficient for his maintenance, because the same is not admissible as a defence to this action.

It is further ordered that as to the 3rd and 4th grounds of said plaintiffs' motion, the same be, and are hereby, overruled.

Cause Continued.

Extract from the Minutes. April Term, A. D. 1881.

NEW ORLEANS, MONDAY, *June 20th*, 1881.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

MARIE P. EVANS
vs.
WILLIAM S. PIKE. } 6494.

This cause came on this day to be heard.
25 William Grant for complainant-, T. Gilmore & Sons for defendants, Lepeyre.
When the said counsel for the defendants having stated to the court that Judge Campbell, one of said defendants' counsel, was unable to attend, and that he was himself physically unable to try the case, it was ordered by the court that said cause be continued till Monday, 27th instant, at 11 a. m.

Application for a Continuance. Filed June 27th, 1881.

MRS. MARIE EVANS *vs.* W. S. PIKE.

And now appears Thomas Gilmore, heretofore of counsel for Emma Doswell and Louisa Pike, made defendants herein, and suggests that the former has, since being made a party to this suit, *has* contracted a marriage with Frank T. Howard, and the latter is married to Leslie Bobb. And that the minor, Gertrude Pike, has attained the age of majority, and prays that the cause be con-
26 tinued to make the husbands aforesaid and said Gertrude Pike parties to this suit.
Thomas Gilmore, being duly sworn, says that the facts stated in the foregoing motion are true to the best of his knowledge and belief.

(Signed) T. GILMORE.

Sworn to and subscribed this 27th June, 1881, before me.
J. A. CHARBONET,
D'y Cl'k.

Hearing and Continuance.

Extract from the Minutes of Monday, June 27, 1881.

MARIE P. EVANS
vs.
WILLIAM S. PIKE. } 6494.

This cause came on this day for trial—William Grant for plaintiff, T. Gilmore and Sons and Singleton and Browne for defendants—when the following-named jurors were called and sworn to well and truly try the issue joined herein: 1. E. P. Toupart; 2. V. Boutté;

3. E. Dejean; 4. H. Boneval; 5. J. T. Casey; 6. A. Denis;
27 7. F. N. Gueringer; 8. M. Gras; 9. A. C. Landry; 10. A. Bienvenu; 11. J. F. Couret; 12. A. W. Hyatt.

And, the jury being complete, the court appointed A. W. Hyatt foreman thereof, and the trial was proceeded with; and, after hearing the pleadings and evidence, the cause was continued until to-morrow at 11 a. m.

Verdict for Defendants.

Extract from the Minutes of Tuesday, June 28th, 1881.

MARIE P. EVANS
vs. } 6494.
WILLIAM S. PIKE.

This cause as continued from yesterday came on this day to be further heard, and the said counsel of the parties as well as the jurors in the cause being all present, the trial was proceeded with; and, after hearing further evidence and receiving a charge from the court, the cause was submitted to the jury, who thereupon did then and there in open court, through their said foreman, render
28 and deliver the following verdict, viz: We, the jury, find verdict for the defendant and against the plaintiff's demand.

June 28, '81.

A. W. HYATT, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Judgment.

Extract from Judgment Book, April Term, A. D. 1881.

NEW ORLEANS, TUESDAY, *June 28th*, 1881.

Court met pursuant to adjournment.

Present: Hon. Don. A. Pardee, circuit judge.

MARIE P. EVANS
vs. } 6494.
W. S. PIKE.

By reason of the verdict of the jury herein, and in accordance therewith, it is ordered, adjudged, and decreed that there be judgment in favor of the defendants, Mary A. Huguet, widow, in community of the late William S. Pike; Gertrude D. Pike, John H. Pike, Emma C. Pike, wife of Frank T. Howard; William S. Pike, Jr., and Mary Louisa Pike, wife of Leslie Bobb; and against the de-
29 mand of the plaintiff, Marie P. Evans, and that said defendants do have and recover of and from the said plaintiffs all their costs herein expended.

Judgment rendered June 28th, 1881.

Judgment signed July 2nd, 1881.

(Signed) DON. A. PARDEE, *Judge.*

Rule for New Trial. Entered and Filed June 30th, 1881.

U. S. C. C., East. Dist. La.

MARIE P. EVANS *et al.*
vs.
WM. S. PIKE'S Heirs. } No. 6494.

On motion of Wm. Grant, attorney for plaintiff, and suggesting to the court that the instructions given to the jury on the trial of this cause was erroneous in point of law, it is ordered that defendants show cause why a new trial should not be granted, on Saturday, the 2nd day of July, 1881, at 11 a. m.

Marshal's Return.

Received, July 1st, 1881, by the U. S. marshal, and on the same day, month, and year I served a copy of the within rule on
30 the persons herein named, in the following manner, to wit:
John A. Campbell, Esq., by leaving the same in the hands of A. Micou, Esq., who stated that he represented the aforesaid John A. Campbell, who is absent from the city.
T. Gilmore and Sons, personally on Thos. Gilmore, Sr.
(Signed) E. S. CURRY,
D'y U. S. Marshal.

Rule for New Trial Continued.

Extracts from the Minutes of Saturday, July 2nd, 1881.

MARIE P. EVANS
vs.
WM. S. PIKE. } 6494.

The rule for new trial herein, returnable this day, is, by consent of counsel, continued till Friday, 8th instant, at 11 a. m.

Rule for New Trial Continued.

Extract from the Minutes of Friday, July 8th, 1881.

MARIE P. EVANS
vs.
WM. S. PIKE. } 6494.

31 It is agreed by counsel that the rule for new trial herein be continued till Saturday, 16th July, 1881, at 11 o'clock a. m.

Rule for New Trial Submitted.

Extract from the Minutes of Saturday, July 16th, 1881.

MARIE P. EVANS
vs.
WM. S. PIKE. } 6494.

This cause came on to be heard on the motion of the plaintiff for a new trial, and was argued by counsel for the mover, whereupon the court took time to consider.

New Trial Refused.

Extract from Minutes, November Term, A. D. 1881.

NEW ORLEANS, WEDNESDAY, *November 16th*, 1881.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

MARIE P. EVANS
vs.
WM. S. PIKE. } 6494.

The rule for a new trial herein taken by the plaintiff on
32 30th June, 1881, having been heard and submitted on a former day, and the court being now sufficiently advised of and concerning the premises, it is ordered that said rule be discharged and a new trial be refused.

Plaintiff's Bill of Exceptions. Filed November 16th, 1881.

United States Circuit Court, Eastern District of Louisiana.

MARIE P. EVANS *et al.*
vs.
HEIRS OF WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this cause the plaintiff offered in evidence the act of donation from Ackley Perkins to Marie Perkins, wife of L. Duncan Linton, now wife of Wm. R. Evans, the present plaintiff, of the Richland plantation, dated Sept. 5, 1861, with the certificate of the recordation of the same in the donation book in the recorder's office of the parish of Baton Rouge, Louisiana, on the same day of its date, which said act of donation and certificate is made part of this bill of exceptions, marked "A," and offered oral proof tending to show that she, the plaintiff, went
33 into possession of said plantation under said act of donation on the day of its date by the appointment of Ackley Perkins, as plaintiff's manager on said plantation, and so remained until the sale by the sheriff to W. S. Pike, plaintiff, being absent in Europe from the date of said donation until after said sale, and the plaintiff having offered proof as to the value of rents and profits, rested her case.

"*Act of Donation. Ackley Perkins to Mrs. Mary Linton.*

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

Be it known that on the day of the date hereof and in the presence of the witnesses hereinafter named and undersigned, before me, William Hubbs, in and for the parish of East Baton Rouge, State of Louisiana, duly commissioned and sworn, personally came and appeared Ackley Perkins, of this parish, who declares that in consideration of the love and affection which he has towards his niece, Mrs. Mary Perkins, wife of Stephen Duncan Linton, also of this parish, and for divers other good and sufficient causes, he has

given and donated and doth by these presents grant, give,
34 convey, assign, and set over in the best form of donation *inter vivas* and irrevocably and forever unto his said niece, Mrs. Mary Linton, wife as aforesaid here present, accepting and receiving for herself, her heirs, and assigns, and being herein duly aided, authorized, and assisted by her said husband, Stephen Duncan Linton, the following described property, to wit:

1st. A certain tract of land or plantation now in the cultivation of sugar situated about two miles from the city of Baton Rouge, containing seventeen hundred and thirty (1,730) arpents, more or less, with all the buildings and improvements thereon, consisting of a dwelling-house, sugar-house, mills, machinery of every description, and all the out-houses pertaining to the same, it being the same property acquired by J. & M. Perkins from Ebenezer Howell on the 19th day of December, 1835.

2nd. One hundred acres of land purchased of a colored woman named Phœbe Anderson.

3rd. A tract of land purchased of Mrs. Williams, containing five hundred acres; making in all twenty-five hundred arpents, more or less.

35 Also 48 mules, 30 heads of cattle, 100 heads of hogs, 15 wagons & carts, farming utensils, household and kitchen furfurniture, 3,000 bbls. corn, hay and fodder, store, and 52 head of sheep. Being the same property purchased by the present donor from sheriff sale, on the 5th day of January last, 1861, at the suit of Fellows & Co. *vs.* J. & H. Perkins, No. 1610 of the records of the sixth judicial district court, and recorded in book R, folio 295, of notarial acts in this office. To have and to hold the above described property, unto the Mrs. Mary Linton, her heirs and assigns forever.

The foregoing act having been read to the parties, was by them approved, and the parties dispensed with the production of a certificate from the recorder of this parish as is required by art. 3,328 of the civil code of this State. Thus done and passed at Baton Rouge in presence of Louis Adams and H. V. Babin, witnesses, who sign their names with the parties, and me recorder, this fifth day of September, in the year of our Lord, one thousand eight hundred and sixty one (1861).

(S'g'd) ACKLEY PERKINS.
MARY LINTON.
S. DUNCAN LINTON.
H. V. BAVIN.
LEWIS ADAMS.
36 WM. HUBBS, *Recorder.*

CLERK & RECORDER'S OFFICE, *Parish of East Baton Rouge.*

I hereby certify the foregoing to be a true and correct copy of the original recorded in notarial book T, folio 76; also in book of donations C, folio 131, of this office.

Given under my hand and seal of office, at Baton Rouge, Louisiana, this 27th day of December, A. D. 1880.

[SEAL.] (Signed) JOHN JASTREMSKI,
D'y Clerk & Recorder."

Thereupon the defendants offered in evidence: 1st. An act of sale and mortgage from E. Howell to J. & H. Perkins, dated December 19th, 1835, of the Richland plantation, duly recorded, which is made part hereof marked "B," the name of the staves being omitted.

Sale of Land. E. Howell to J. & H. Perkins.

STATE OF LOUISIANA, *Parish of West Feliciana:*

Be it known that on the day of the date hereof, before me,
37 John B. Dawson, parish judge of said parish and *ex-officio* notary public in and for the same parish, personally came and appeared Ebenezer Howell, of the first part, of the parish and State aforesaid, who declared and acknowledged that for and in consideration of the sum and price of one hundred and thirty thousand dollars, lawful money of the United States, to be paid by John Perkins and Henry Perkins, residents of said parish and State, of the second part, to wit, the sum of fifteen thousand dollars, payable on the first day of January, 1837; the sum of fifteen thousand dollars, payable on the first day of February, 1838; the sum of eleven thousand two hundred and fifty dollars on the first day of February, 1839; the sum of eleven thousand two hundred and fifty dollars on the first day of February, 1840; the sum of eleven thousand two hundred and fifty dollars, payable on first day of February, 1841; the sum of eleven thousand two hundred and fifty [dollars] on the first day of February, 1842; the sum of eleven thousand two hundred and fifty dollars on the first day of February, 1843; the
38 sum of eleven thousand two hundred and fifty dollars on the first day of February, 1844; the sum of eleven thousand two hundred and fifty dollars on the first day of February, 1845; and the sum of twenty-one thousand two hundred and fifty [dollars] on the first day of February, 1846, all bearing 10 per cent. interest after date until paid, hath given, grant[ed], bargained, and sold, set over, delivered, and conveyed, and by these presents doth give, grant, bargain, sell, set over, deliver, and convey unto the said John Perkins and Henry Perkins, their heirs and assigns, the said party being present and accepting, the following-described property, to wit, a certain plantation and slaves in the parish of East Baton Rouge containing seventeen hundred and thirty arpents of land (more or less) and having seventy-five slaves, together with stock, fixtures, &c., &c., being the same property purchased by Wm. Garrett Johnson and William Gayoso Johnson, of the testamentary heirs of John Anderson, in said parish of East Baton Rouge, on the 13th day of January, 1834, as will appear by act passed before Charles Crawford of that
39 date, being also the same property purchased of Wm. Garrett Johnson and William Gayoso Johnson by Ebenezer Howell on the 15th day of May, 1835, said act being passed before John B.

Dawson, parish judge, and is now recorded in book E, notarial records, pages 395 and 396; said property is sold and received in this act, pursuant to the two acts called for as above, with all its increases and decreases; to have and to hold the said plantation and seventy-five —, with all the rights, titles, privileges, and appurtenances of, in, and to the same belonging or in anywise appertaining, unto the only proper use and behoof of the said John Perkins and Henry Perkins, their heirs and assigns, forever, and the said Ebenezer Howell, for his heirs, executors, &c., the before-recited land and negroes unto the said John Perkins and Henry Perkins, their heirs and assigns, will warrant and forever defend against himself, said said Ebenezer Howell, his heirs and assigns, and all and every other person or persons whatsoever.

Thus done and passed at St. Francisville, in the parish and
40 State aforesaid, this nineteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five, in the presence of Jos. B. Thomas and R. J. Dawson, assisting witnesses, who, having signed their names as such, I grant these property under my official signature and seal the day and year above written, both parties agreeing to waive the parish judge's certificate of mortgage, &c.

(Original signed) E. HOWELL.
JOHN PERKINS.
HENRY PERKINS.
JOS. B. THOMAS.
R. G. DAWSON.
JNO. B. DAWSON,
Parish Judge.

Recorded this 25th March, 1836. Copy returned to John Perkins.

(S'g.) CHAS. TEZZRIO, *P. J.*

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

I hereby certify the foregoing to be a true copy from the record in book P, folio 56, of the parish judge's records in this office.

Given under my hand and seal of office, at Baton Rouge, this 24th January, 1872.

[SEAL.] (Sig'd) JOHN McGRATH,
Recorder.

41 2d. A judgment of the second judicial district court for the parish of West Feliciana, dated February 18th, 1859, against J. H. Perkins for the sum of $16,890.25, and in favor of Mrs. Eliza C. Johnson as the mortgage notes secured in the act of sale, and mortgage marked "B," and duly recorded with the right of mortgage upon said Richland plantation to secure the same.

3d. The execution issued upon said judgment, directed to the sheriff of the parish of East Baton Rouge, directing the sale of said Richland plantation to satisfy said judgment.

4th. The return of the sheriff endorsed on said execution, showing that he seized the Richland plantation by virtue of said writ, on the

20th day of May, 1861, and offered the same for sale after due appraisement and advertisement, but that their being no bidder who would offer ⅔ of the appraised value the property was again offered for sale on a credit of twelve months, and finally sold and adjudicated to Ackley Perkins on the 3rd day of August, 1861, for $100,000.

5th. The deed duly recorded from the sheriff to Ackley
42 Perkins made under this sale, which is annexed to this bill, marked "C," the name of slaves being omitted, and made part thereof.

Sheriff's Deed to Ackley Perkins.

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

Whereas I, Henry V. Babin, sheriff of the parish of East Baton Rouge, by virtue of a writ of *fi. fa.*, issued and to me directed from the hon. the sixth judicial district court in and for the parish of East Baton Rouge, against the goods and chattels, lands and tenements of J. & H. Perkins *et al.*, at the suit of Fellows & Co. *vs.* J. H. Perkins, No. 1610 of the records of the hon. sixth judicial district court in and for the parish and State aforesaid, did seize the following-described mortgaged property, to wit, the Richland plantation, consisting of the following tracts of land, to wit:

1st. A certain tract of land or plantation now in cultivation of sugar, situated about two miles from the city of Baton Rouge, containing seventeen hundred and thirty (1730) arpents, more or
43 less, with all the buildings and improvements thereon, consisting of a dwelling-house, sugar-house, mills and machinery of every description, and all the outhouses pertaining to the same, it being the same property acquired by J. & H. Perkins from Ebenezer Howell on the 19th day of December, 1835.

2d. One hundred acres of land purchased of a colored woman named Pheobe Anderson.

3d. A tract of land purchased of Mrs. Williams, containing five hundred acres, making in all twenty-five hundred arpents, more or less; also 48 mules, 30 head of cattle, 100 head of hogs, 15 wagons and carts, farming utencils, household and kitchen furniture, 3,000 bbls. corn, fodder, and hay in store, and 52 head of sheep.

And after advertising the same in the Baton Rouge Gazette & Couret, a public newspaper published in said parish in the city of Baton Rouge, as the law requiring, to be offered at public sale on the premises, at about 2½ miles from the city of Baton Rouge, on Saturday the 5th day of January, A. D. (1861) eighteen hundred and sixty-one, at 11 o'clock of said day, did proceed to the sale and adjudication of the above described property after complying with all the formality of law, such as reading aloud the public
44 advertisement and parish recorder's certificate of mortgage, &c., and having exposed the same to public sale according to law for cash, with the benefit of appraisement under the mortgage in favor of Fellows & Co., for the use of Duncan F. Linton and subject to the payment of all previous mortgages and privileges, and interest thereon existing on said property, whether expressed in said

recorder's certificate of mortgage or not. Ackley Perkins became the purchaser thereof for the price and sum of one hundred and seventy-five thousand dollars ($175,000.00) which I do hereby acknowledge to have received from the purchaser as follows: In cash the sum of twenty-five thousand dollars, and the balance retained in said purchaser's hands to pay and satisfy all previous mortgages, privileges, and interest thereon as expressed above.

Now, therefore, know all men by these presents that I, the said sheriff, do, in consideration of the premises, and by virtue of the act in such case made and provided, grant, bargain, and sell, assign, and set over unto the said Ackley Perkins and his legal and
45 lawful heirs and assigns all the above described property, land, improvements, and slaves, &c., and all the right, title, interest, and claim which the said J. & H. Perkins & *al.* defendants, on the 19th day of December, 1835, or at any time since had in or to the said above described property or any part thereof, to hold the same to the said Ackley Perkins, Esq., his legal and lawful heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal, this fifth day of January, A. D. 1861, in the year of our Lord one thousand eight hundred and sixty-one, and in the eighty-fifth of the independence of the United States of America.

(S'g'd) H. V. BABIN, *Sheriff.* [SEAL.]

Signed and delivered in presence of—
(S'g'd) V. A. ALLAIN.
(S'g'd) J. M. NELSON.

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

I hereby certify the foregoing to be a true copy from the original record in the book "R," folio 295, of notarial acts of this office.
46 Given under my hand and seal of office, this 24th January, A. D. 1872.

[SEAL.] (Signed) JOHN McGRATH, *Recorder.*"

6th. The 12-months bond given by Ackley Perkins, in payment of the price, with Wm. S. Pike and J. M. Williams as sureties, made a part of this bill, marked "D," the names of the slaves being omitted.

Twelve-Months Bond.

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

By this public instrument of writing, be it known, that we, Ackley Perkins, as principal, and J. M. Williams and Wm. S. Pike, as securities, acknowledge ourselves indebted to Mrs. Eliza C. Johnson, of the parish of West Feliciana, and State aforesaid, in the just and full sum of thirty thousand six hundred and ninety-five dollars and eighty cents ($30,695.80), with interest at the rate of ten per cent. per annum on the sum of twenty-nine thousand three hundred and forty dollars and twenty cents ($39,340.20) from this date
47 until paid, which payment well and truly to be made on the third (3rd) day of August, eighteen hundred and sixty-

two (1862), we bind ourselves jointly and severally, our heirs, executors, administrators and assigns, firmly by these presents. And the better to secure the payment of the above sum of thirty thousand six hundred and ninety-five dollars and eighty cents ($30,695.80), and interest thereon.

We mortgage the following property, to wit: A certain tract of land or plantation, known as the Richland plantation, and situated in this parish, East Baton Rouge, about two and one-half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the buildings and improvements thereon and thereto belonging; also the growing crop of cane, corn, &c., &c.; also the entire stock of cattle, hogs, horses, mules, sheep, &c., on the said plantation, as described in the sheriff's deed of sale to the said Ackley Perkins, bearing equal date with this instrument; and the said Ackley Perkins, as principal, and J. M. Williams and Wm. S. Pike, as secureties, do hereby acknowl-
48 edge this to have the force of a final judgment.

I- witness whereof we have hereunto set our hands and seals, in the presence of subscribing witnesses, this third (3rd) day of August, in the year of our Lord eighteen hundred and sixty-one (A. D. 1861).

(Signed) ACKLEY PERKINS. [SEAL.]
" J. M. WILLIAMS. [SEAL.]
" WM. S. PIKE. [SEAL.]

In the presence of—
(S'g'd) H. V. BABIN, *Sheriff.*

7th. An execution issued on the 12-months' bond against Ackley Perkins, J. M. Williams, and Wm. S. Pike, October 10th, 1865, made part hereof, and marked " E."

Execution on Twelve-Months Bond.

The State of Louisiana to the sheriff of the parish of East Baton Rouge, Greeting:

We command you that by seizure and sale of the property, real and personal, rights and credits of Ackley Perkins, J. M. Williams, and William S. Pike, in the manner prescribed by law, you cause to be made the sum of thirty thousand six hundred and ninety-
49 five dollars and eighty cents, debts, with interest at the rate of ten per cent. per annum from the third day of August, 1861, on the sum of twenty-nine thousand three hundred and forty dollars and twenty cents until paid, and also the sum of four dollars thirty-five cents, costs; as well as your own costs and charges, to satisfy a twelve months' bond lately given by the said Ackley Perkins, J. M. Williams, and William S. Pike in favor of Mrs. Eliza C. Johnson.

And how you shall have executed this writ you make return to our said court in seventy days, as the law directs.

Witness the Honorable H. C. Edwards, judge of the said court, this 10th day of October, A. D. 1865.

CHARLES B. COLLINS,
Clerk of said Court.

[Endorsed:] The property upon which the twelve months' bond is given is as follows, to wit: "A certain tract of land or plantation known as the Richland plantation, and situated in this parish
50 (East Baton Rouge) at about two and one-half miles from the city of Baton Rouge, and containing nineteen hundred and eleven acres, more or less, with all the buildings and improvements thereon and thereunto belonging." October 10th, 1865. Charles B. Collins, clerk.

8th. The return of the sheriff of East Baton Rouge made upon said execution, showing a sale of the Richland plantation, by virtue of a seizure thereof, to William S. Pike, January 6, 1866, made part hereof, marked "F."

"Sheriff's Transfer.

STATE OF LOUISIANA:

Whereas I, Edward Causinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of *fieri facias* on a twelve months' bond, and to me directed, from the honorable seventh judicial district court of the State of Louisiana in and for the parish of West Feliciana, against the goods and chattels, lands and tenements of Ackley Perkins, J. M. Williams, and William S. Pike, at the suit of Eliza C. Johnson *vs.* J. & H. Perkins, No. 1311 of the records of the honorable judicial district court in and for the parish of West
51 Feliciana, State of Louisiana, did seize the following-described property, to wit: A certain tract of land or plantation known as the Richland plantation, and situated in the parish of East Baton Rouge, at about two and one-half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1911) acres, more or less, with all the buildings and improvements thereto belonging.

Which property was advertised in the Baton Rouge Gazette and Court, a public newspaper published in this parish, East Baton Rouge, for fully thirty days next preceding the day of sale, as the law requires, to be offered at public sale in front of the court-house door of said parish of East Baton Rouge, on Saturday, the sixth day of January, it being the first Saturday of said month, in the year of our Lord one thousand eight hundred and sixty-six (A. D. 1866), at eleven (11) o'clock a. m. of said day, for cash, without the benefit of appraisement, and at the time and place above designated, after complying with all the formalities of law, such as read-
52 ing the public advertisement, terms of sale, and the parish recorder's certificate of mortgage against the above-described property, being the Richland plantation in East Baton Rouge, and having exposed the same to public sale, according to law, William S. Pike, of the city of New Orleans, La., became the purchaser thereof for the sum and price of forty-six thousand seven hundred and twenty-five $\frac{00}{100}$ dollars ($46,725.00), which I hereby acknowledge to have received as follows, under the instructions ef the plaintiff and with the consent of the purchaser, viz: Twenty thousand $\frac{00}{100}$ dollars ($20,000.00) in cash, and in three notes, each for the sum of

eight thousand three hundred and eighty $\frac{50}{100}$ dollars ($8,380.50), bearing ten per cent. interest per annum, the rates of interest of the judgment from this date, payable at the banking house of Pike, Lapeyre & Brother, in the city of New Orleans, to the order of the plaintiff, Mrs. Eliza C. Johnson, at one, two, and three years from date, with the agreement, made by the parties, that said purchaser, Wm. S. Pike, reserves the right to pay said note at any time before maturity, at the stated domicil-, and with the ex-
53 plicit understanding that upon the payment and liquidation of said notes the value of the United States currency is to be estimated at no greater rate of depreciation than as compare width the comparative rate of gold and United States currency on the first day of February, eighteen hundred and sixty-six (1866); this adjudication and sale to be recorded in the —— of the parish recorder of the parish of East Baton Rouge, in the book of mortgages, and the vendor's mortgage to be retained on the property adjudicated until the full and final payment of the above-described notes; said notes to be paraphed by the recorder to identify them with the property adjudicated as aforesaid, and not to be sold or alienated to the prejudice of the plaintiff, the holder thereof; the balance of the purchase-money, viz: the sum of fifteen hundred and eighty-two $\frac{20}{100}$ dollars ($1,582.20), to be paid to Hill and Markham by said Pike, the purchaser. Now, therefore, know all men by these presents that I, the said sheriff, do, in consideration of the premises and by virtue of the act in such case made and provided,
54 grant, bargain, and sell, assign, and set over to the said William S. Pike, and to his legal and lawful heirs and assigns, all the above-described property, to wit: The Richland plantation and all the right, title, interest, and demand which the said Ackley Perkins, J. M. Williams, and William S. Pike, on the third day of August (1861), eighteen hundred and sixty-one, or at any time since had in or to the said property, to wit, the Richland plantation or any part thereof, to hold the same to the said William S. Pike and his legal heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal at Baton Rouge this sixth day of January, in the year of our Lord one thousand eight hundred and sixty-six (A. D. 1866).

ED. COUSINARD, *Sheriff.*

Sealed and delivered in the presence of—
B. F. BUYAR,
A. M. DUNN.

STATE OF LOUISIANA, *Parish of East Baton Rouge*:

RECORDER'S OFFICE.

I do certify the foregoing and written sheriff's deed to be duly recorded in this office in book T, folios 105 to 107 of Conventional Mortgages.

55 Given under my hand and seal of office at Baton Rouge, this sixth day of January, A. D. 1866.

[SEAL] JOHN O'CONNOR, *Recorder.*

9th. The sheriff's deed, duly recorded, to William S. Pike, of the Richland plantation, in due form, made in accordance with said return, and proof that said Ackley Perkins lived on said plantation from the date of said sale by the sheriff to Wm. S. Pike without any apparent change of possession, plaintiff being abroad during the intervening period.

And defendants offered no evidence of any proceeding against the plaintiffs by the hypothecary or any other form of action to subject said plantation to the payment of said judgment and 12-month bond.

And defendants having offered some evidence of the question of rents and profits not material to this bill, both parties closed the case, the plaintiff submitting her case on her act of donation from Ackley Perkins, and the defendants submitting their defense upon the judicial proceedings aforesaid and the title derived from the
56 sheriff's sale of January 6th, 1866, under the execution on the twelve-months bond, and upon no other judicial proceedings and no other titles except such as are mentioned in the pleadings.

And it being shown and admitted that defendants took possession of said Richland plantation under the deed of January 6th, 1866, on the day of its date, and continued in possession down to October 5th, 1871, the date of service of citation in this cause, a period of more than five years, the court, at the request of the defendant's counsel, charged the jury as follow:

"If the jury find that Wm. S. Pike, from whom the present defendants inherit their title, had been in the possession of the Richland plantation, the property in dispute, for a period of five years, and that he purchased the same from any person authorized to sell at public auction, then any informality connected with or growing out of said sale is prescribed by the lapse of five years from the time of making it."

And, further, that under the terms of the decision of the Supreme Court in this case, as rendered by Mr. Justice Bradley and
57 filed herein, which this court feels bound to follow, this prescription, if proved, is decisive of the controversy and operates as a bar to plaintiff's action, and gives to defendants a title by prescription against the plaintiff.

To which charge the plaintiffs' counsel then and there excepted. 1st. Because said charge is not the law of the case. 2d. Because said charge in effect creates a new term of prescription by which real property may be acquired in Louisiana not recognized by the law. 3d. Because in Louisiana a party must have possessed real property for a period of ten years in good faith and under a just title translative of property to acquire property by prescription. 4th. Because the prescription of five years only cures defects and informalities growing out of a sale made under a writ of execution as between the parties to the record and the writ, and does not operate to confer title where the defendant in the writ had none nor to matters *dehors* the record. 5th. Because the seizure and sale of the

property in dispute under a judgment and writ against Ackley
58 Perkins, to which plaintiff was not a party, did not divest her of the title previously acquired by her, even if the informalities connected with the sale have been cured by the prescription of five years. But the court overruled the exceptions taken to said charge and gave the same to the jury, who rendered a verdict upon the same against the plaintiff and in favor of the defendants.

And the plaintiff in due time tendered this her bill of exceptions and prayed that the same be allowed and signed; and the same is here now done accordingly.

(Signed) DON A. PARDEE,
Judge.

Petition and Order for Writ of Error. Filed June 8th, 1883.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

MARIE P. EVANS & WM. R. EVANS
vs.
MRS. MARY A. PIKE, Widow of WM. S. PIKE, Deceased, and natural Tutrix of the minor Gertrude D. Pike, John H. Pike, Emma C. Pike, widow of Gray
59 Doswell, Wm. S. Pike, Jr., and Mary L. Pike. } No. 6494.

To the honorable the judge of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of Marie P. Evans and Wm. R. Evans, plaintiffs in the above-entitled cause, respectfully represents that there is error in the judgment rendered against them in said cause on the 28th day of June, 1881, and signed on the — day of November, 1881, to their prejudice, which they desire to have corrected.

Wherefore petitioners pray that a writ of error may be allowed them in the premises, returnable to the Supreme Court of the United States at the next term thereof, to be holden in Washington on the second Monday in October, A. D. 1883.

(Signed) WILLIAM GRANT, *Att'y.*

A writ of error is allowed in this case, returnable as prayed, upon plaintiffs giving bond, with solvent surety, conditioned as the law directs, in the sum of two hundred dollars.

New Orleans, June 8th, 1883.

(S'g'd) DON A. PARDEE,
60 *Judge of United States Circuit Court, Eastern District of Louisiana.*

Bond for Writ of Error. Filed June 9th, 1883.

Know all men by these presents, that we, Marie P. Evans and William R. Evans, as principals, and William Grant, as surety, are held and firmly bound unto Mrs. Mary A. Pike, widow of William S. Pike, deceased, and natural tutrix of the minor, Gertrude D. Pike; John H. Pike, Emma C. Pike, widow of Gray Doswell; William

S. Pike, Jr., and Mary L. Pike in the full and just sum of two hundred dollars, to be paid to the said Mrs. Mary A. Pike and others above named, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of
61 Louisiana, in a suit depending in said circuit court wherein Marie P. Evans and William R. Evans are plaintiffs and the said Mrs. Mary A. Pike and others, above named, are defendants, judgment was rendered against the said Marie P. Evans and William R. Evans in favor of the said defendants, and the said Marie P. Evans and William R. Evans having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mrs. Mary A. Pike and others, above named, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Marie P. Evans and William R. Evans shall prosecute their writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else, to remain in full force and virtue.

(Signed) WILLIAM GRANT. [L. S.]
MARIE P. EVANS, [L. S.]
WM. R. EVANS, [L. S.]
" By WM. GRANT, *Att'y.*

62 UNITED STATES OF AMERICA, }
Eastern District of Louisiana, } *ss:*

Personally appeared Wm. Grant, who, being duly sworn, deposes and says: That he is the surety on the within bond; that he resides in the city of New Orleans, and is worth the full sum of two hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) WM. GRANT.

Subscribed and sworn before me, this 9th day of June, 1883.
(Signed) F. A. WOOLFLEY,
Commissioner U. S. Circuit Court, Eastern District of Louisiana.

63 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United

States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 62 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had subsequent to the mandate of the Supreme Court of the United States in the case of Marie P. Evans *et al. vs.* William S. Pike *et als.*, No. 6494 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 26th day of July, A. D. 1883.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

F. A. WOOLFLEY, *Clerk.*

Two (2) words interlined & approved.
Nine (9) words erased.

I, Don A. Pardee, United States circuit judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 26th day of July, A. D. 1883.

DON A. PARDEE,
Circuit Judge.

Three (3) words interlined, approved.

64 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment a plea which is in the said circuit court before you, or some of you, between Marie P. Evans & William R. Evans and Mrs. Mary A. Pike, widow of William S. Pike, deceased, and natural tutrix of the minor Gertrude D. Pike, John H. Pike, Emma C. Pike, widow of Gray Doswell, William S. Pike, Jr., and Mary L. Pike, a manifest error hath happened, to the great damage of the said Marie P. Evans and William R. Evans, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

65 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 6494. Marie P. Evans *et als.*, plaintiffs in error, *versus* Mrs. Mary A. Pike, widow, &c., *et als.*, defendants in error. Writ of error. Filed June 8th, 1883. F. A. Woofley, clerk.

66 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Mrs. Mary A. Pike, widow of William S. Pike, deceased, and natural tutrix of the minor Gertrude D. Pike, John H. Pike, Emma C. Pike, widow of Gray Doswell; William S. Pike, Jr., and Mary L. Pike, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Marie P. Evans and Williams R. Evans are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Marie P. Evans and William R. Evans as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

67 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 6494. Marie P. Evans *et als.*, plaintiffs in error, *vs.* Mrs. Mary A. Pike, widow, &c., *et als.*, defendants in error. Citation to def'ts in error. Marshal's return. Received June 9, 1883, by the U. S. marshal, and on June 16th, 1883, I served a duplicate of the within writ of errors on the defendants in error herein named, to wit, Mrs. Mary A. Pike, widow of William S. Pike, deceased, and natural tutrix of the minors Gertrude Pike, John H. Pike, Emma C. Pike, widow of Gray Doswell; William S. Pike, Jr., and Mary L. Pike by leaving the sam- in the hands of Thomas Gilmore, Esq., the attorney of record for the aforesaid defendants in error, in the city of New Orleans. J. R. G. Pitkin, U. S. marshal, eastern d's't of La., by E. S. Curry, d'y U. S. marshal.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a duplicate of the within writ or error on the defendants in error herein named, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal.

Subscribed and sworn before me, June 18th, 1883.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Endorsed on cover: E. Louisiana, C. C. U. S. No. 252. Marie P. Evans and William R. Evans, plaintiffs in error, *vs.* Mrs. Mary A. Pike, widow of William S. Pike, deceased, and natural tutrix of the minor Gertrude D. Pike, John H. Pike, Emma C. Pike, widow of Gray Doswell; William S. Pike, Jr., and Mary L. Pike. Filed 6th August, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

MARIE P. EVANS *et al.*
vs.
Mrs. MARY A. PIKE *et al.* } No. 252.

The document entitled "sheriff's deed to Ackley Perkins," page 18 of the printed record, having been copied with the transcript by error, it is agreed the same shall be erased and the deed annexed to this stipulation printed and substituted in lieu thereof.

New Orleans, La., January 12, 1886.

WM. GRANT,
Att'y for Pl'ffs in Error.
JOHN A. CAMPBELL,
For Def'ts in Error.

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

Whereas I, Henry V. Babin, sheriff of the parish of East Baton Rouge, by virtue of *alias* writs of *fi. fa.* issued, and to me directed from the hon. seventh judicial district court in and for the parish of West Feliciana, against the goods and chattels, lands and tenements of John and Henry Perkins, at the suit of Eliza C. Johnson *vs.* J. & H. Perkins, Nos. 1311 and 1363 of the records of the hon. seventh judicial district court in and for the parish of West Feliciana, State aforesaid, and at the third opposition of Messrs. Hill & Markham *vs.* J. & H. Perkins, issued from the seventh judicial district court aforesaid, did seize the following-described property, to wit, a certain tract of land or plantation known as the "Richland plantation," situated in the parish of East Baton Rouge, at about two and a half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1911) acres, more or less, with all the buildings and improvements thereon, sugar mill, engine, and apparatus for making sugar; also the growing crop of corn, cane, &c., &c., together with all the named and described slaves, to wit: Hannibal, aged forty-two years; Pinto, aged 40 years; Harrison, aged 21 years; Cumbo, aged 14 years; Randall, aged 32 years; Alpha, aged 24 years; Chloe, aged 50 years; Tenah, aged 55 years; Louisa, aged 14 years; Diana, aged 7 years; Emma, aged 6 years; Billy, aged — years; Sally, aged 28 years; Charity, aged 24 years; Noah, aged 12 years; Long Isaac, aged 28 years; Mary, aged one year; Rodich, aged 50 years; Moses, aged 16 years; Rody, aged *aged* 50 years; Alfred, aged 8 years; Short Isaac, aged 36 years; Hannah, aged 26 years, and

her infant child; Gustave, aged 51 years; Lucy, aged 30 years; Eliza, aged one year; Loris, aged 21 years; Betsey, aged 26 years; Sam, aged 11 years; Hector, aged 8 years; Abraham, aged 26 years; Christoper, aged 46 years; Little Jim, aged 16 years; Zachariah, aged 22 years; Big Hannah, aged 22 years; Francis, aged 3 years; Butler, aged 25 years; George, aged one year; Barbarra, aged 22 years; Henderson, aged 23 years; Annis, aged 23 years; Girard, aged one year; Joe, aged 3 years; Peter, aged 20 years; Collins, aged 50 years; Maria, aged 35 years; Jim Smart, aged 14 years; Sam, aged 33 years; Goncy, aged 28 years; Jefferson, aged 2 years; Dickey, aged one year; Daniel, aged 20 years; Lucy, aged 17 years; Short Frank, aged 54 years; Polly, aged 25 years; Amanda, aged 13 years; Jim Flood, aged 43 years; Priscilla, aged 25 years; Jenny, aged one year; Bill, aged 15 years; Hiram, aged 38 years; Maria, aged 28 years; Sally, aged 12 years; Milly, aged 11 years; Judy, aged 21 years; Roberts, aged 15 years; Roberts, aged 16 years; Beckey, aged 16 years, and Matilda, aged — years; also the entire stock of cattle, hogs, horses, mules, sheep, &c., &c., on said plantation, and, after advertising the said property in the Baton Rouge Gazette and Comet, a public newspaper published in said parish of East Baton Rouge, as the law requires, to be sold at public sale on the premises, at about two and a half miles from the city of Baton Rouge, on Saturday, the 3d day of August, A. D. (1861) one thousand eight hundred and sixty-one, at 11 o'clock a. m., of said — on a credit of twelve months and at the time and place above designated, after complying with all the formalities required by law, such as reading aloud the public advertisement and parish recorder's certificate of mortgages existing on said property, and having exposed the same at public sale, Ackley Perkins, Esq., became the purchaser thereof for the sum and price of one hundred thousand dollars ($100,000.00), which I do hereby acknowledge to have received from the purchaser as follows: In two twelve months' bonds of this day and date, one for the sum of thirty thousand six hundred and ninety-five [and] $\frac{80}{100}$ dollars ($30,695 80), with ten per cent. per annum interest on the sum of twenty-nine thousand three hundred and forty [and] $\frac{20}{100}$ dollars ($29,340.20) from date until paid, in favor of Mrs. Eliza C. Johnson and signed by Ackley Perkins, as principal, and J. M. Williams and William S. Pike, as securities, and made payable one year after date; the other in favor of Hill and Markham for the sum of two thousand one hundred and seventy-five [and] $\frac{25}{100}$ dollars ($2,175.25), with five per cent. per annum interest from date until paid, signed by Ackley Perkins, as principal, and J. M. Williams and William S. Pike, as securities; also payable one year from date. And the balance of said adjudication, say sixty-seven thousand one hundred and twenty-eight [and] $\frac{95}{100}$ dollars ($67,128.95), being retained in said purchaser's hands to pay and satisfy all other privileged claims and mortgages existing on the said property.

Now, therefore, know all men by these presents that I, the said sheriff, do, in consideration of the premises and by virtue of the act in such case made and provided, grant, bargain, and sell, assign

and set over to the said Ackley Perkins and his legal and lawful heirs and assigns all the above-described property of land and all the improvements thereon, slaves, and stock, and all the right, title, interest, and demand which the said John and Henry Perkins, defendants, on the first day of February, eighteen hundred and fifty-one (A. D. 1851), had in or to the said property or any part thereof, to hold the same to the said Ackley Perkins and his legal and lawful heirs forever.

In witness whereof I have hereunto set my hand and seal this third (3) day of August, in the year of our Lord one thousand eight hundred and sixty-one (A. D. 1861).

(Signed) H. V. BABIN, *Sheriff.* [SEAL.]

Sealed and delivered in presence of Messrs.—

(Signed) F. C. BABIN,
W. W. OLDHAM,
Witnesses.

Recorded 10th August, A. D. 1861.

WM. HUBBS, *Recorder.*

RECORDER'S OFFICE,
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA.

I do hereby certify that the foregoing act is a true copy of record in book C, folio 12, of judicial mortgages of this office.

Given under my hand and seal of office, at Baton Rouge, this 24th day of February, A. D. 1873.

[Seal Recorder's Office, Parish of East Baton Rouge, State of Louisiana.]

JOHN McGRATH, *Recorder.*

RECORDER'S OFFICE,
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA.

I do hereby certify that the twelve months' bond executed by Ackley Perkins, with William S. Pike and J. M. Williams as sureties, in the purchase of Richland plantation, in this parish, at sheriff's sale, on the 3d day of August, 1861, under writs of *fi. fa.* issued from the seventh judicial dist. court, parish of West Feliciana, at the suit of Eliza C. Johnson *vs.* J. & H. Perkins, being No. 1311 & 1363 of the docket of said court, and being the same twelve months' bond referred to in the foregoing and above copy of sheriff's sale to said Ackley Perkins, was never recorded in any of the books of conventional mortgages of this office, and is not now and has never been of record as a mortgage or lien in any of said conventional mortgage records.

Given under my hand officially and the seal of my said office, at the city of Baton Rouge, this 24th day of February, 1873.

[Seal Recorder's Office, Parish of East Baton Rouge, State of Louisiana.]

JOHN McGRATH, *Recorder.*

[Endorsed:] Sup. Court U. S. Oct. term, 1885. No. 252. Marie P. Evans & *al.*, pl'ffs in error, *vs.* Mrs. Mary A. Pike, Widow, &c., Stipulation of counsel and addition to record. [Stamped:] Office Supreme Court U. S. Filed Feb. 23, 1886. James H. McKenney, clerk.

Sheriff sale of Richland plantation to Ackley Perkins. Copy. $2.50.

118-241

FILED.
APR 5 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 252.

OCTOBER TERM 1885.

MARIE P. EVANS ET AL. PLAINTIFFS IN ERROR.

versus

MRS. MARY A. PIKE ET ALS., DEFENDANTS IN ERROR.

—o—

WM. GRANT,

Attorney for Plaintiff In Error.

Supreme Court of the United States.

No. 252.

OCTOBER TERM 1885.

MARIE P. EVANS ET AL. PLAINTIFFS IN ERROR.

versus

MRS. MARY A. PIKE ET ALS., DEFENDANTS IN ERROR.

STATEMENT.

—o—

This case has been twice tried in the court below. The first judgment was in favor of the plaintiffs, but was reversed in this court, the case being reported under the title of Pike vs. Evans, 94 U. S. 106.

Judgment at the second trial was rendered against the plaintiffs, and the cause is now here again, on writ of error sued out by them.

The case presented by the petition is one at law, purely and simply, and is styled, under the law of Louisiana, a petitory action, the equivalent of the action of ejectment at common law.

The issues in the cause arise out of the matters set up in defense, and will be better understood from the following facts, which are conceded.

In 1835 Henry and Jehu Perkins purchased the Richland plantation of E. Howell, giving their notes

for a part of the purchase price, secured by mortgage on the property. The mortgage contained a simple hypothecation of the estate, and was without the usual clause styled, the pact *de non alienando*—a stipulation not to alienate to the prejudice of the mortgage. New Record p. 16.

Subsequently, Eliza C. Johnson became owner of the notes, upon which she obtained judgment against Perkins, directing a sale of the mortgaged property to satisfy the debt. Execution was taken out, and the property sold on the 3rd day of August 1861, to Ackley Perkins, for $30. 695.80, on a credit of 12 months. New record pp. 18-19.

The purchaser executed his 12 months bond for the price, with J. M. Williams & W. S. Pike as sureties; granting therein a mortgage on the property to secure the same. New record p. 20. But the bond, if that fact could affect the question, was not recorded in the mortgage office.

On the 5th day of September 1861, Ackley Perkins donated the property to Mrs. Evans, then the wife of S. D. Linton, the present plaintiff, the act of donation being duly registered in the book of donations of the Parish.

On the 10th day of October 1865, four years subsequent to the acquisition of title by Mrs. Evans, Eliza C. Johnson, took out execution on the 12 months bond, and without making an actual seizure, sold the property on the 6th day of January 1866, to W. S. Pike, to whose interests these defendants have succeeded. New record pp. 20, 21, 22.

Not having been made party to any of the proceedings by which Pike claimed to have acquired title, Mrs. Evans was advised that she had not been divested of her property by the sale of January 6, 1866, and she brought this suit on the 19th day of July 1871 to recover possession from Pike.

By his answer Pike claimed title to the property, through the sheriff's sale of January 6, 1866; and in avoidance of plaintiff's title averred.

1° That the act of donation from Ackley Perkins to Mrs. Evans was void, being in fraud of creditors.

2° That Ackley Perkins did not possess more than twice the amount of the property donated, over and above his debts.

3° That he did not retain sufficient property for his support and subsistence.

4° That plaintiff's demand was prescribed by 1, 3 and 5 years. Old record pp. 5, 11, 15.

The case was first tried on these issues, and on the plea of prescription, Judge Woods charged the jury as follows :

"That if the Sheriff did not seize the property, that is an informality not cured by the prescription of five years."

For error in this instruction, the judgment in favor of plaintiffs was reversed, in Pike vs Evans, 94 U. S. 106.

After the case was remanded, the Circuit Court, on motion of plaintiff's attorney, struck out the 1st and 2d. pleas, holding the matters therein set up, not admissible as defenses, in a suit at law. New record pp. 1,

10. The issues, therefore, at the second trial, were 1st. whether plaintiff had a superior title, and 2d whether the action was prescribed.

The case was, however, decided solely on the plea of prescription of five years, Judge Pardee charging, at the request of defendants, as follows: "If the jury find that Wm. S. Pike, from whom the present defendants inherit their title, had been in possession of the Richland plantation, the property in dispute, for a period of five years, and that he purchased the same from any person authorized to sell at public auction, then any informality connected with, or growing out of said act of said sale is prescribed by the lapse of five years from the time of making it. *And further*, that under the terms of the decision of the Supreme Court, as rendered by Mr Justice Bradley, and filed herein, which this court feels bound to follow, this prescription if proved, is decisive of this controversy, and gives to defendants a title by prescription against plaintiffs." As this instruction was based upon the conceded fact of Pike's possession of five years, the verdict was for defendants.

It seems, therefore, unnecessary to discuss any of the other questions in the case, and I shall confine myself to the question of prescription.

ASSIGNMENT OF ERRORS.

1° The Court erred in instructing the jury that the prescription of five years was decisive of the controversy, and if proved, gave defendants title.

Argument.

Since the Circuit Court put an end to plaintiff's pretentions, by holding their action to have been barred by the statute of limitations when the suit was brought, I propose to discuss this question, without reference to others which might have arisen on the merits.

Four years prior to the seizure of the property under the writ of *fieri facias* against Ackley Perkins, the latter had transferred the legal title to Mrs. Evans by an act of donation. Pike's title was derived from Perkins through a proceeding against him, four years after he had thus parted with title, and to which Mrs. Evans was not a party.

He had possessed the property under his deed, something over five years when this suit was brought, and the Circuit Judge held, in effect, and so instructed the jury, that defendants had *acquired* the property by such possession.

This instruction was based upon an erroneous interpretation of the opinion of Mr. Justice Bradley in Pike vs. Evans, and a clear mistake of the law applicable to the case. It may be fairly presumed when the issue decided in that opinion is considered, that the Court intended simply to decide the question presented by the instruction, which was whether the omission of the Sheriff to make a tangible seizure of the property was an irregularity cured by the prescription of five years. The Circuit Judge had instructed the jury that it was *not*, but this Court held that this, as well as all other irregularities, were included in the statute.

Having come to this conclusion, Your Honors' reversed the judgment, for error in that respect.

It followed as a logical sequel to the opinion on the main question, that a sheriffs' deed, thus cured of irregularity might become the basis of the prescription of ten years, by which property is acquired, under the Civil Code of Louisiana, as was said by Mr. Justice Bradley. But it is not to be inferred the Court intended to decide that possesion of property for a less period than ten years, under a deed, either perfect un form originally, or made so by the lapse of five years, can give a title to lands in Louisiana. The whole purpose of the statute was to prevent any one disputing the regularity of a judicial sale after the lapse of five years.

But the code provides under what circumstances property may be acquired by possession. Article 3478 provides: "He who acquires an immovable in good faith and by a just title, prescribes for it in ten years."

Other provisions of the Code which follow define what is a just title, and good faith; but where the possessor has both, he must still possess for the period of ten years to defeat the action of the true owner.

In Madden vs. Finley 2 R. 466, the Supreme Court of Louisiana has declared that a marshal's deed though irregular, constitutes a just title through which property may be acquired, by ten years possession. To the same effect is Loduf vs. Baily 3 A. 8.

No case, can be found which holds that property may be acquired by a possessor in good faith, under

the most regular and perfect deed in form, in a period of less than ten years.

The statute prescribing against irregularities in auction sales, does not purport to furnish a means of acquiring property, though it may have that effect incidentally. For instance, if the plaintiffs' right to recover depended on the fact whether the seizure had been made in a judicial sale, as required by law, five years prescription would defeat the action. But plaintiffs in this case do not and need not, allege that defendants' title is void, or voidable because there was no tangible seizure of the property. Mrs. Evans was not a party to the judgment, nor the execution under which her property was sold. As to her the Sheriff had no authority to sell, and the prescription of the informalities, could not divest her title. Robert vs· Brown, 14 A. 597.

If Mrs. Evans had been a defendant in the proceeding under which the property was sold, she could not set aside the sale, save on the ground of omissions and irregularities connected with it ; and an action to avoid the sale on these grounds would have to be brought within five years or it would be barred by the statute of limitations.

But Mrs. Evans was the legal owner of the property which was seized and sold under a writ against Ackley Perkins.

Her complaint is that her title was not divested by such a proceeding, no matter how regular and perfect it might have been as between the parties. A defect of this character is not a mere irregularity, but

an absolute nullity. As it arises *dehors* the record, it is not cured by the prescription of five years. Jackson vs. Ludeling, 21 W. 638.

The defendants are in no better position than they would be, if they held a deed from Ackley Perkins instead of one from the Sheriff, for a grantor without title, can give none, whether by voluntary or forced conveyance. The rule is the same in Louisiana as elsewhere, that the rights of a seizing creditor are no greater than those of his debtor. Ballio vs. Poisset, 8 Martin, N. S. 337; Smith vs. McMicken, 3 A. 319.

It seems clear to me the plaintiff had a right to contest defendants' title, and that the court erred in instructing the jury that her action was barred by the prescription of five years; and that possession of the property for the same period gave defendants a title.

At the first trial, counsel with mistaken zeal, urged the want of seizure against the validity of defendants' alleged title, though it was not necessary to a recovery. Indeed, I am now of the opinion, that Mrs. Evans, being a stranger to the deed, had no right to set up any irregularities connected with the sale. The instruction was probably erroneous on this as well as for the reason given by the court for reversal of the judgment.

This time the Judge of the Circuit Court has gone too far the other way, and laid down a rule, under a misconception of the true spirit of the opinion, as written by Mr. Justice Bradley, which if adopted by

this Court, will create a new term of prescription by which property may be acquired in Louisiana.

Since the instruction complained, terminated plaintiff's action, and if erroneous, will authorize, a new trial, I do not think it necessary or useful, to discuss the questions which would have arisen upon the merits of the controversy. But I refer the court to the case Ford vs. Douglass, 5 H. 143, to show that even in Louisiana, a creditor cannot disregard a conveyance made by his debtor, and seize the property without some proceeding against the owner.

Plaintiffs in error therefore pray that the judgment of the Circuit Court may be reversed and set aside, and a new trial be awarded.

Respectfully submitted,

WM. GRANT,

Attorney for Plaintiff In Error.

118-24

APR 20 1886
JAMES H. McKENNEY,
CLERK

Supreme Court of the U. S.

October Term, 1885.

No. 252.

MARIE P. EVANS AND HUSBAND

vs.

MARY S. PIKE ET AL.

Error to the Circuit Court of the United States, Eastern District, Louisiana.

JOHN A. CAMPBELL,
Attorney for Defendants.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

Supreme Court of the U. S.

October Term, 1885.

No. 252.

MARIE P. EVANS AND HUSBAND

vs.

MARY S. PIKE ET AL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT, LOUISIANA.

I.

MATTER OF CONTROVERSY.

The plaintiffs commenced this suit in the Circuit Court in October, 1871, to recover the Richland plantation, in the parish of East Baton Rouge, of William S. Pike in a petitory action. The defendant died pending the suit and the present defendants are his heirs, and widow. There was a trial in the Circuit Court, and a writ of error from this Court, and in 1876 the judgment of the Circuit Court in that trial was reversed. This decision is reported as Pike *vs.* Evans, 94 U. S. R., p. 6.

II.

Statement of Facts.

William S. Pike, the original defendant, purchased the Richland plantation in Louisiana, at a sheriff's sale, the 6th of January, 1866, in the suit of Mrs. Eliza C. Johnson against John and Henry Perkins, pending in the State District Court in the parish of East Baton Rouge. The judgment had been recovered in February, 1859, in that Court against those defendants, for a debt in money, and a right of mortgage upon the Richland plantation aforesaid, Record, p. 17. An execution had been issued on this judgment in 1861, and this plantation was seized by the sheriff, appraised, and offered for sale. At this offer no bid was made of an amount of two-thirds of the appraisement as required. The sheriff afterward offered the property for sale upon a twelve months' credit, for what it might bring, and at this sale, Ackley Perkins, a brother of the defendants, became the purchaser at the *price* of $100,000. A twelve months' bond was made by him, dated the 3d of August, 1861, the day of the sale, with J. M. Williams and William S. Pike as his joint sureties, and the payment of the price to be made the 3d of August, 1862. The bond declares, that it has "*the force of a final judgment;*" *there is a mortgage of the plantation purchased* embraced in the terms of this bond, Record, p. 17–18–19–20. The bond was not paid at the date specified (3d of August, 1862), nor was there any payment made at all by the parties to the bond to fulfil the obligation. In the autumn of 1865, Mrs. Johnson, the plaintiff in the execution and obligee in the bond, caused an execution to issued on the bond, and this was levied by a seizure of this plantation. The slaves had been emancipated, and are not referred to. No appraisement was required in a case of such a seizure and sale; and the sale was made for *cash*. William S. Pike, one of the *sureties*, purchased the property for the sum of $100,000, for which he was personally bound, and obtained a deed to, and delivery of the property sold.

He, and his heirs, have had possession from the 6th of January, 1866. No opposition was made to the sale nor to the occupation by Pike at the time, nor till this suit was commenced five years and nine months after, in October, 1871. Ackley Perkins occupied the property from the sale in August, 1861, at which he bid off the property, until the sale in January, 1866. He paid nothing on account of his bid, nor to the plaintiff in the execution, Mrs. Johnson.

III.

The Titles of the Respective Parties.

The facts disclosed already, indicate the title of William S. Pike the defendant, which is the subject of contestation by Mrs. Marie Perkins Evans. The Richland plantation was conveyed to John and Henry Perkins in December, 1835, by E. Howell, for a large sum, to be paid in ten annual instalments, for which they gave their notes to him. Mrs. Eliza Johnson was the holder of a portion of the notes and her suit was commenced in 1857, to establish her debt, and her right of mortgage. Her judgment is stated in the record, Record, p. 16–17. The issue of execution; the seizure, and offer to sell the plantation; the failure to sell except upon a credit of twelve months; the sale on this credit and the execution of a bond, and the default of payment of the bid and the bond, and the issue of an execution against the purchaser and his sureties, with a sale by the sheriff to William S. Pike appear in the record.

The plaintiff, Mrs. Marie Perkins Evans, first appears in these proceedings as Mrs. Mary Perkins Linton, the wife of S. D. Linton, and the niece of Ackley Perkins, who was a brother of John Perkins, one of the defendants, the father of Mrs. Evans.

On the fifth day of September, 1861, a few weeks after the sale of the Richland plantation upon a credit of twelve months, by the sheriff, Ackley Perkins made an act of donation to his niece Mrs. Mary Perkins Linton. Her name is subscribed to the act of

donation, in company with her husband. The bill of exceptions states that she was absent in Europe from the date of that act in September, 1861, till subsequent to the sale in 1866 to William S. Pike, under the execution against Ackley Perkins, J. M. Williams and William S. Pike, parties to the twelve months' bond of the date of August, 1861.

The act of donation was produced on the trial as the only document of title of the plaintiff. Record, p. 14. She had never occupied the property, nor made a claim to occupy it, so far as the record discloses from the date of the act of donation; nor made a claim until October, 1871, when as Mrs. Evans she commenced this suit in the Circuit Court of the United States.

Points of Law and Authorities.

I.

The judge of the Circuit Court, in the charge to the jury, relied upon the opinion of this Court in respect to the title of the parties as rendered in the case of Pike *vs.* Evans, 94 U. S. R., p. 6.

The argument of counsel in that case was confined to a statute of the State, and which is incorporated into the Civil Code under the title of prescription, C. C., 3543; Rev. Stats. of La., sects. 168, 2809.

The statute is "that all informalities *connected with* or *growing out of* the sale by any person authorized to sell at public auction shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women or interdicted persons, Rev. Stats., p. 168; C. C., pp. 35, 43.

In order that property coming under the control of a Court in the course of a cause be properly disposed of, rules are prescribed to protect the owners of the property, the parties seeking to change the title and the persons who shall become purchasers. There are orders to be made by the Court, notices to parties, delays to be

allowed, conduct to be pursued at the sale, returns to be filed, moneys to be appropriated and a title to be given to the purchaser. Many of these are observed as a matter of course, and in general the duties are performed with punctuality. There are persons interested to observe them. All of the requirements which are made to accomplish the aims of the Court in consummating the act of administration are formalities. After the lapse of five years all of such connected with the sale or arising from the sale itself are not the subject of inquiry after that time. Our difficulty in this case is to ascertain what was not done.

II.

The charge of the Circuit judge assumed that the titles of these parties had been examined by this Court in the case of Pike *vs.* Evans (*supra*) and that this Court had determined adversely to the present plaintiff. The exceptions taken at the last trial are very general, and were probably framed so as to seek for a review of these titles. There has been no addition to the testimony of title. The plaintiff claims that her "act of donation" vests her with a complete legal title, to support a demand for the plantation and all of the fruits since her suit was made in 1871.

We are unable to find any title whatever in Ackley Perkins, but one limited and conditional. He went into possession and might cultivate the plantation, maintain, ameliorate it and support the charges of it, and exercise a real, effective, and juridical force, as a proprietor under his sheriff's deed for a time. But all of this was under the inexorable condition that he should pay the *price* bid by him for the property according to the bond. In the Common law States a vendor may sell his property on a credit; receive a mortgage or rest on his vendor's lien. Upon a failure to pay, the mortgage or lien is enforced and there is a *re-sale* under judicial orders and the sale of the vendor to vendee ceases to be operative. So Ackley Perkins was *bound* to pay the price and gave *sureties;*

he made a *mortgage;* he *confessed a final judgment* contemporary with his purchase of the plantation, C. P., arts. 681, 682.

In case of a non-compliance with those engagements as vendee and to pay the price, the austere and strict conditions in the code of practice become active and operative. An execution may be sued out by the plaintiff in the execution and delivered to the sheriff. The sheriff *must immediately* seize, and then *sell* for cash after advertisement, C. P., arts. 719, 720, 721. This is the bargain. The condition under which the title was limited and by which annulled.

III.

The arrangements completed the third of August, 1861, by the sale of the plantation to Ackley Perkins, is a landing place in the procedure for the sale of the property to enforce the judgment rendered in the District Court. There followed, of course, a suspension of pursuit until the third of August, 1862. In the first week of September afterward (1861), Mrs. Mary Perkins Linton, with her husband, became parties to an *act of donation* made by her uncle Ackley, because of his avuncular affection for his niece, in which the uncle donated to the niece this large property which had cost him a BID of $100,000; the payment of which sum was deferred for twelve months. Two gentlemen are his sureties for this payment; also, there are obligations of a very stringent and minatory character exacted of each for the punctual fulfilment of their engagements. The donee does not assume to perform any part, in the discharge of their debt, created for the *price*, and without which, there could be no assurance of any fruition of this bounteous effusion of love and affection. The hypothecary creditors of John and Henry Perkins, represented by Mrs. Johnson, had been postponed, *not paid*. The executions had not been satisfied. Whether the donation be effectual depends whether the price be paid. If there be no payment there is a process to force a RE-SALE. Mrs. Johnson may cause an execution to issue to the

sheriff, who shall *forthwith* seize the property, and cause it to be sold after advertisement. These proceedings in their readiness and vigor are like those in the La folle enchère of the Louisiana code and statutes. The folle enchère is superinduced by the error, or fault, or fraud of one, who goes to a public sale, and successfully bids for property which he has not the ability, or perhaps the purpose to pay for.

The remedy for such acts of folly or fraud is that the imperfect sale be set aside as incomplete. There is a dissolving condition inherent in all such enterprises. The application of this remedy is to avoid the act *ab initium* with all of the effects and the consequences. If in an extravagance of delusion and folly the so-called purchaser shall make gifts, sales, hypothecations, exchanges, they are annulled with the annulment of the first bargain. It is of the essence of the sale that the price be paid. In the case before this Court, there is a want of respectability among all of the parties. The purchaser, before paying any part of the price, and with sureties involved by him in a contract imposing a heavy debt—payable at a distant day, inconsiderately or fraudulently transfers the property to another without any pecuniary consideration. The donee accepts a gratuitous benefaction of property, not paid for, and fully incumbered in the hands of this donor for all that it is worth, or could bring under favorable conditions of exposure for sale. Neither donor nor donee have a thought of the mass of creditors who have already given credit to the possessor for more than it has sold for; nor have either one of them offered any reimbursement to William S. Pike or his family for the sums they have paid and the loss they have incurred.

It is an essential principle in the law of judicial sales in Louisiana that they shall not be annulled nor rescinded unless by one who has an interest in the result of the suit, and that he shall make an offer of a full indemnity to the parties whose interests are to be affected by the judgment.

The debtor cannot recover until the price applied to the payment of his debts be refunded to him.

Stockton *vs.* Downey, 6 A., 581.
McEnery *vs.* Pargoud, 10 A., 497.
11 Martin, 610.
8 N. S., 162; 12 A., 251.

The money paid by William S. Pike was applied to extinguish the debts of John and H. Perkins which encumbered the plantation since 1835. It was applied to pay the price bid by Ackley Perkins for this property and for which he gave his bond, with Pike as his surety and which Pike paid at the re-sale.

Taylor *vs.* Huey, 11 Ann., 614.
Seawell *vs.* Payne, 5 A., 255.
Coiron *vs.* Millandon, 3 A., 664.

IV.

The act of donation made by Ackley Perkins to Mrs. Linton, his niece, conveys nothing beyond that which the donor was the owner of, and with all of the conditions and restraints existing in him as the possessor. When the donation was made both understood that the property had been seized and had been sold upon a credit of twelve months for which Ackley was the principal debtor and had given the sureties and pledges imposed by law for the payment. In the course of time execution issued against him and his sureties, there was a seizure and a sale of this property for the payment of the price he had never paid. Ackley Perkins occupied the property at this time.

There was no opposition by the donee to the seizure made under the execution. The sheriff certifies that he did *seize* the property and did sell it after advertisement and a compliance with all other of the formalities of law. No objection or opposition was interposed, and the possession of the property was surrendered to the purchaser.

Mullen *vs.* Fallen, 12 A., 838.

The sale, if injurious to any party having an interest, might have been attacked for any irregularity; or failure to comply with the rules of the Court.

Mullen *vs.* Harding, 12 A., 838.

The defendant in the execution, Ackley Perkins, is bound by all of the prescriptions applicable to such proceedings. The plaintiff, Mrs. Linton, at no time became a party to the proceedings. She did not assume to pay any part of the debt described in the bond. Nor was she in possession of the property asserting ownership. It remained in the hands of Ackley Perkins on the same conditions after as before the donation.

The service of a notice upon her to abdicate the possession, so that a seizure might be made, would have been nugatory and vain. The seizure and sale made in January, 1866, was made to collect the price which Ackley had never paid. The sale to Ackley was eliminated and the title of William S. Pike relates bac[illegible] made in 1861, and transfers *by the terms of the adju* property and the estate in it as it existed at that date.

relative to sheriff's sale upon a credit, in respect to t procedure; the securities taken of the obligors in the b[illegible] given; and their enforcement by process after, apply also to sales on credit in succession sales; sales of minors' property and the bonds of public officers; C. P., 990; C. C., 342, 1062; Rev. Stat., 586, 3411.

In none of these regulative statutes, and codical provisions relating to proceedings against defaulters on this description of bonds taken for sales made upon a credit, is the hypothecary action alluded to. In all reference is made to the twelve months' bond as the model in respect to procedure against the obligors. In fact the hypothecary action is unsuited to it. The hypothecary action is an ancient action which preceded a long time before the adoption of the system of inscription of conveyances, hypothecations and privileges upon the public records to afford information.

Transfers affecting property were inaccessible and occult. A hypothecary creditor would proceed *via ordinaria* so long as his debtor retained the property, as in the case of Mrs. Johnson *vs.* J. and H. Perkins in the record, C. P., 68. Sometimes the creditor introduced a condition which survives; viz., the *pactum de non aliendo:* by which he could proceed directly against his debtor and none other to enforce the mortgage. But in the absence of the *pact* and when an alienation had taken place so that a third possessor became a person of importance, the hypothecary action was resorted to, C. P., 68.

In that better time insolvency, bankruptcy, or default of payment were regarded with disfavor. Pothier speaks of such things as being deemed ignominious and that none were willing to sue the third possessor as a delinquent. He was not the debtor. It was not clear that he was bound for the debt, or interested to disencumber the property. None were willing to stigmatize a person without some reason. The hypothecary action therefore commences with a demand upon the *debtor* to pay the overdue mortgage debt. The failure to obtain this money being ascertained by a refusal, the creditor addresses the third possessor to inform him of it, and to ask of him to abandon the mortgaged property in his occupation, so that the creditor might cause it to be seized and sold—or, if this be not done, to pay him the debt. After this the mortgagee may proceed to sue the third possessor to abandon or to pay. The hypothecary may be willing to abandon the property, which is formally done and a curator is then appointed to represent the absentees interested in the disposition of the property mortgaged.

C. C., 3400, 3406.
C. P., 64–74.
9 Demante Cours, 361, sect. 152.
31 Laurent, 248, sect. 278.
3 Aubry and Rau, 436, sect. 445, note.

The expedients in use among us of selecting some defendants to represent a multitude of parties, does not seem to differ in principle.

What this plaintiff objected to on the first trial was that Mrs. Linton was not proceeded against in this manner. The plaintiff in execution, Mrs. Johnson, should have demanded payment of Ackley and of his sureties, then notified Mary Perkins Linton and her husband to vacate the possession and to leave her to proceed with her hypothecary action by making a seizure and a sale of it, or otherwise to pay the debt.

V.

Our objection has already been set forth. The owners of the plantation, J. and H. Perkins, had evacuated in August, 1861. Ackley had agreed to purchase and pay for the property and gave sureties. But this is not sufficient. The debt to the creditors has not been reduced, but aggravated by continuing increase of interest and the costs of the suit. The fact was certain that whatever right that the creditors had was ascertained and the debtors had all been convicted. There was confession of judgment, a renewed hypothecation attached to it and a power to have execution by applying to the clerk and to have a seizure made immediately. There is not perhaps any legal objection to a proceeding *via ordinaria* on any mortgage inscribed on the records, but a case of such a suit would be anomalous. The sale on a credit for twelve months had resulted in a postponement of a collection for more than three years, in addition to that agreed upon in 1861.

In the autumn of 1865 there was a renewal of the judicial proceedings for the enforcement of the judgment rendered in 1859. The plaintiff procured an execution to be issued against the parties to the twelve months' bond. Ackley Perkins or Mrs. Mary Perkins Linton might have relieved themselves and the Richland plantation from all encumbrances, by an application to the Court for leave to pay the amount due on the bond into the registry of the Court. Their title would have then been made perfect. Messrs. Williams and Pike would have been discharged from liability, and the hypothecary creditors satisfied. A course so

direct and simple was that best adapted to the situation. She might have presented to the Court an opposition to impeach the validity of the procedure in any manner she might suppose to be useful, C. P., 396, 398. When the adjudication was made in favor of Mr. Pike, it was competent for them to submit oppositions and objections to any of the proceedings relative to the transfer to Mr. Pike. A sale like this extinguishes all of the mortgages subordinate to that of Mrs. Johnson. The creditors take any surplus. Any creditor could contest an illegal distribution of the price.

C. P., 301, 401, 403.

Fullin *vs.* Husband, 7 Rob., 73.

Wright *vs.* U. S. Bank, 7 Ann., 123.

The jurisdiction of the District Court over the original suit for the establishment of the mortgage of the plaintiff and over the precise question of the condemnation and sale of the property for the payment of the hypothecary creditors—not only the plaintiff, but of all—is a general jurisdiction requiring the Court to determine all the incidental and accessory questions which arise in cases frequently complex and intricate. Among the questions to be determined is that in respect to the parties and the rights of the parties before the Court. This jurisdiction is over the sale and the price, and over the modifications to be made of rules because of circumstances.

In this case the sale was made, the price was distributed, the mortgages erased, the purchaser receives from the Court the adjudication of the property and delivery from the hand of the Court. Who is entitled to impeach these proceedings and at what time and before whom? Can it be done collaterally, and by a person coming into the Court with a gratuitous title derived in the course of the cause from a party in Court, without the leave of the Court, and who submitted his title in all of its extent for the determination of the Court in respect to its operation and efficacy? The partner in the proceeding stands aloof for a long term of years and asks of

another jurisdiction to subvert the action of the Court which had full jurisdiction.

Coiron *vs.* Millandon, 3 Ann., 666.
Nouge *vs.* Clapp, 101 U. S., 551.
Bogert *vs.* Smith, 18 H., 158.

VI.

A petitory action requires for its support a subsisting and superior title, entitling a plaintiff to a judgment affirming its validity and entitling him to possession of the property because of his ownership. The plaintiff has produced an act of donation from Ackley Perkins of this plantation as her only muniment of title. It appears in the record that her father and her uncle, J. and H. Perkins, had purchased it in 1835, but these did not complete the payment for it. Whatever estate they had was sold the third of August, 1861, to pay a part of the price agreed upon in 1835. Ackley Perkins, her uncle, purchased that title at the sale. But Ackley was deficient in the same manner and a larger extent than his brothers, John and Henry. He paid nothing whatever. In January, 1866, the sheriff sold the plantation to William S. Pike as follows: In consideration of the premises I do grant, bargain and sell . . . to the said William S. Pike and his heirs all the right, title, interest, to the above described property, viz.: the Richland plantation . . . which the said Ackley Perkins . . . on the third day of August, 1861, or at any time since, HAD, and any part thereof; and to his heirs. Record, p. 22, fo. 54. So it appears that the District Court determined in its adjudication to William S. Pike that the Court might sell and transfer the entire interest which had been sold on a credit in 1861, and that the sale in 1866 was retroactive and embraced a full title. This is certainly proper, because Mrs. Johnson, the plaintiff, founds her suit upon a lien created in 1835 by Ebenezer Howell, the vendor to the brothers J. and H. Perkins, and which Mrs. Johnson had acquired with the notes of that firm given in payment.

The judgment of Mrs. Johnson was given to recover the amount by the sale of the property hypothecated for that purpose in 1835. In January, 1866, this property was sold, and the purchaser was William S. Pike, and the money he employed satisfied her debt, and extinguished her hypothecation and yielding the property to the purchaser.

Ackley Perkins had failed to pay the price he promised at the sale to him. If he had purchased at the first offer of the property the payment would have been made and the title complete.

He bought on a credit of twelve months. The plaintiff in the execution was not paid. She had asked for a vindication of her right of mortgage and obtained a judgment that she had such a right and was entitled to have a sale for the payment. But under the rules she only received certain securities which suspended the satisfaction for one year. Instead of money she obtained a bond with sureties and pledges and reservations of mortgage. In August, 1862, when the bond became due, there was civil war and a suspension of the Courts; and this condition remained until 1865.

VII.

The Civil Code of Louisiana describes a dissolving condition, when accomplished, as operating the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation; it only obliges the creditor to restore what he received, in case the event, the condition takes place, C. C., 2045, 2046. Here, the condition in the engagement of Ackley Perkins was the payment of *price* for property. He failed to pay, and the sale was vacated. There was a *re-sale* and a transfer of the property to another. The proceeding resembles that which appears in the Louisiana Code and the statute as "La folle enchère." Larombière, in discussing the article of the Napoleon code, which corresponds to that we have copied, says, "that its principle is to be found in several of

the articles of the code of procedure, with appropriate modifications according to the nature of the contracts." Arts. 733, 858, 964, 988, Fr. Code of Pro. It is applied to *judicial sales* with particular *severity*, in consequence of the solemnity of contracts passed under the authority of the tribunals. In case of default in executing the terms of adjudication the immovable will be sold "a sa folle enchère" (733). And this disposition is not applicable, merely to adjudications of *judicial sales* of immovable property, but to adjudications at auctions, where the sales are *voluntary* (838) to sales of minors and of successions. The pursuit en folle enchère in reality is nothing more than a resolution of a sale for the non-payment of the price—a true, tacit, resolutory condition. The procedure is different for the reason that the legislature is required to apply it, according to the nature and forms of the various contracts. As an adjudication has for its aim to convert into money an immovable, recourse must be had to the public sale. Larombière des, ob. vol. 2, pp. 314, 315.

In none of these sales does the French code of procedure refer to the hypothecary action. There is a certificate of a failure to comply with the conditions of the sale, a notice to the defaulter, an order for a re-sale if the case requires it, and a re-sale takes place. The Civil Code of Louisiana provides for re-sales in cases of a failure to fulfil the conditions. C. C., 2611, 2617; C. P., 689.

In the Court of Chancery whenever a purchaser neglects or refuses to make the payment of the price bid, the practice is to have a *re-sale* at the cost and at the risk of the purchaser.

Harding *vs.* Harding, 4 M. & C., 515.

2 Danl. Ch. Pr., 1282–4, Amer. ed.

The purchaser at a judicial sale is submitted to the jurisdiction of the Court in respect to all the matters connected with the sale, and relating to him in his character of purchaser.

Requa *vs.* Rea, 2 Paige, 339.

Wood *vs.* Mann, 3 Sumner, 318.

Miller *vs.* Skerry, 2 Wall., 237.
Clarkson *vs.* Read, 15 Gratt., 288.

The sale made to Ackley Perkins in August, 1861, on a twelve months' credit placed him on the record as the responsible party in the proceedings which might become necessary.

Drouet *vs.* Rice, 2 Rob., 374.

He had acquired a title to the property and was liable for the amount of the bid and he and his sureties were answerable to the Court. Without any leave of or notice to the Court he shortly afterwards transferred his own interest to a married woman who was about to leave the country. There is no appearance of fidelity to the Court, to the creditors whom he has delayed, or the sureties he has involved in such a course of conduct. A Court of Chancery requires much assurance from a purchaser at one of its sales, before it will consent to the transfer of the bid.

Holroyd *vs.* Wyatt, 2 Collier, 327.
Proctor *vs.* Farnam, 5 Paige, 614.

We do not say that this conduct was forbidden or that the act was void, but the party to such an act acquires no standing in the Court by any such conduct, nor title to appear without coming through those approaches which are open to all. The conditions of the suit had been settled so that the Court could perform its entire duty. If this donee who comes under no obligation to the plaintiff in the execution to pay the debt or to take care of the property and goes beyond seas, it is difficult to determine what the Court wanted with her or could do about her, or with her.

There was no evidence that she was a suitable party to proceed against as a third possessor, for the simple reason that she did not possess. The property had been and was still under jurisdiction of the District Court by the contracts executed in 1861, the party to the purchase at that sale, and to the bond and the confession of

judgment, was in the occupation of the property he had received from the sheriff.

VIII.

The plenitude of jurisdiction which belongs to such a Court with such a cause, which had so far progressed, is manifested by numerous decisions. In late cases the Chancery opened decrees which were final as confirmatory of sales of property under its orders so as to administer justice. There is a power to bind and a power to loose. The Court is responsible for a judicial and judicious use.

Campbell *vs.* Holyland, 7 Ch. D., 166.
Barlow *vs.* Osborne, 6 H. L. Cas., 556.

The Courts protect their jurisdiction over property held in its custody and disposed of under its rules in suits brought in the Court, and other Courts recognize that with the disposition made by those Courts ought not to be interfered with upon the demand of some suitor who has been lying out in ambush.

Jeter *vs.* Hewett, 22 H., 352.
Coiron *vs.* Millandon, 3 A., 666.
Nougue *vs.* Clapp, 101 U. S., 551.
Johnson *vs.* Waters, U. S., 113, p.—

IX.

The plaintiff, with every opportunity to intervene in the District Court as a party if she had an interest that was worthy of a support or maintenance, did not appear at all. The property of her near relations had been purchased at a public sale by another of her kinsmen and bestowed upon her in the course of a few weeks, indicates that she had the means of knowledge of the exact condition. Her donor had contracted a *debt* of $100,000 as the price of that property, and the property and his friends and himself were all pledged to the Court and had become parties to the litigation. Her donor was the primary debtor. It was in October,

1865, between four and five years before any new proceedings in the cause were commenced. The District Court proceeded according to the articles of the code of practice. C. P., 719–722. An executory process was granted under the conditions of these articles by the Court, and the seizure and sale took place in January, 1866. The plaintiff, as the donee, was not served with a summons as a third possessor. It is a rule in Chancery that when a suit is commenced against a mortgagor in possession and ownership by the mortgagee, that were he to alienate by mortgage, lease, donation, or sale, the conditions of the suit by this alienation made *pendente lite* would not be in any wise altered. These alienees have constructive notice and are bound by the decree which shall be rendered.

1 Danl. Ch. Pr., 280–281, 4 Am. ed.
Story, Eq. Plead., sect. 194.
Tilton *vs.* Cofield, 94 U. S., 163.
2 Jones on Mort., sect. 1664.

The Civil Code of Louisiana provides, "The thing claimed as the property of a claimant cannot be alienated pending the action so as to prejudice his right." C. C., 2463.

The Supreme Court of the State says, "It is a rule of universal jurisprudence which has been recognized by the Civil Code that every man is presumed to be attentive to what passes in Courts of Justice of the State where he resides or has transactions. A purchaser of an estate actually in litigation, and without express or implied notice of the fact, affects the purchaser in the same manner as if he had such notice and he will accordingly be bound by the decree."

Gillespie *vs.* Cammack, 3 A., 248; 12 A., 873.
Conrad *vs.* Watzell, 29 A., 465; 13 Lous., 260.

Suppose that the plaintiff in execution had sought to make Mrs. Linton and husband parties to a hypothecary action, she would have commenced by a demand upon Ackley Perkins and his

sureties to pay the debt. Ackley would be found in possession of the property, the primary debtor and the manager for his niece. We should have asked the pair to leave the premises or to pay the debt. The fact was that Ackley had long ago confessed a judgment for the debt and power to issue process. This was provided for some weeks before the donation was delivered to Mrs. Linton. The code of practice settles in the case that process shall issue and that seizure must be *immediately* made. There was no need for notice to this party because the failure operated as a revocation of the rights in the property which had been conferred by the sale in 1861. Aubry and Rau, in discussing the article of the Napoleon Code 1184—La. Code, 2045—says the principle of the retroaction of the rule contained in the Code does not apply merely to the relations of the parties among themselves. It determines the fate of all the acts passed by the debtor subject to the condition with other parties and of the judgments rendered *pendente* condition, in this sense that they cannot be employed against the creditor.

4 Aubry & Rau, Cours., 73, sect. 302.

Privileges and hypothecations are extinguished by the resolution of the right which the debtor had in the property affected. The debtor was not the owner of the property, or if so, with a faculty in one to repurchase or of redemption, in either case hypothecations vanish by the exercise of those faculties by those parties.

37 Dalloz, Jurisp. G., 830, No. 2575.

In the Court of Cassation, Koke *vs.* C. Dumas, the Court say, "That considering it is a principle of law that the failure in the execution of the essential and positive conditions of a contract that it becomes inoperative and as if it had not been made; that in matters of adjudication at public sales where the buyer (adjudicataire) in not complying with the terms of payment submitted, there is a ground to proceed to a new sale, which serves as the amount to be claimed in a new section; that the effect of the annulment retroacts

to the day of the sale made and there is no effective transfer of the property to the buyer, therefore, the buyer never having been an owner, no alienation by him has any validity."

C. Cass. Ch. requete, 9 Jan., 1854.

43 Dalloz, Jurisp. Gen., p. 915, Note (3).

The hypothecary creditors have a claim upon the price as against the purchaser of an immovable sold until he has paid the price, and can pursue the property into whatever hands it may come, although it may be those of a person who has purchased at a public sale and without notice of the claims. It is a real right which inheres to the property.

37 Dalloz, Jurisp. G., No. 1742, Priv. & Hy., p. 577.

The question of right in this suit seems to be exceedingly clear and that the plaintiff in this suit has no estate nor title which will furnish support for a petitory action.

X.

1.

The plaintiff in this petitory action exhibits a single document of title to the property described in her petition, an act of donation executed the day that it bears date (September 5, 1861), by an uncle who was in possession of the property by a purchase made the third of August previously, at a sale made by the sheriff of the district of the parish of Baton Rouge under an execution of the District Court of that judicial district of Louisiana. It is admitted on all hands that the sheriff's sale made on the third of August was regular and that the sale was accepted by the parties to the execution, and that the title sold was a valid title to the property sold. It is the property in controversy.

II.

This title was made to Ackley Perkins by the sheriff. The sale was made to him for the sum of $100,000, the price bid, for which he gave a twelve months' bond with two sureties, who acknowledged the debt, to be paid the third of August, 1862. The bond contained a confession of a final judgment and a mortgage of the property sold to Perkins as the purchaser. The payment was not made at the time specified, and the obligor, Ackley Perkins, and none for him, offered to pay it.

III.

In the autumn of 1865 an execution was issued from the district in behalf of the creditor, prosecuting the suit and to whom the bond was given as obligee. This execution was executed by a seizure and sale made in January, 1866. At this sale William S. Pike purchased the property for the sum specified in the bond and the execution issued thereon, and the execution was with a proces verbal returned by the sheriff. No contestation of the proceedings was made. The purchaser paid the price, and the sheriff gave a deed and delivered the property into the possession of William S. Pike, the original defendant. The defendants are his heirs at law.

IV.

The defendants deny the validity of the title of the plaintiff. It appears that the author of her title did not pay *any portion of the price* at the date of the sale, or at any time thereafter, nor offered to do so, nor has the plaintiff, his donee. That the District Court in consequence of that default caused another execution to be issued, caused the seizure, sale and delivery of possession of the property to the buyer, William S. Pike, who paid the price and exhibits the adjudication of the title to him to take effect on the third of August, 1861, the date of the bond, as appears in the record. That

thus the sale to Ackley Perkins and that of his niece was vacated and their title abrogated.

Washburn v. Greene 13 A 334
Rowley v. Kemp 2 A 366

It is manifest from the Constitution, Codes and Statutes of Louisiana that the District Court of the Seventh Judicial District is a court of competent jurisdiction over the controversy in that Court in respect of the subject of the dispute, and of the parties thereto, and in respect to all of the incidents and accessories of the same as shown in this record. The suit of Mrs. Eliza Johnson, the plaintiff in the execution was against the mortgagors and owners of the Richland plantation. Ackley Perkins was introduced to that suit by his purchase on a twelve months' credit of the estate mortgaged and subjected to sale, and the plaintiff by the donation made to her afterward by him. The acceptance of this donation imposed upon her all of the *real* obligations attaching to the property at the date of the donation. One of these was a connection with the suit as a party interested in a pending and progressing suit. The first subject for her consideration was what should be done in respect to the payment of the *bid* made at the sale in August by Ackley Perkins. She had an unquestionable right to pay the debt and to purge the property of encumbrances and privileged liens. It has been decided that she might act in her own name for her own interest by way of third opposition in respect to all of the orders or proceedings made after the donation to her. With leave of the Court she might oppose all orders made before her connection which affected her donor. She could have examined all of the hypothecary claims which might be produced for payment out of the sum of $67,128.95 to which the judgment of Mrs. Johnson did not apply. She acquired a right to make opposition to the exposure of the property to sale in 1866.

42 Dalloz, Jurisp. Gen., Verbo Tierce opposition, 385–6, Nos. 144–152.

It would be an answer to her claim to make opposition that there was simulation, collusion, or covin between Ackley Perkins and herself or that she was an interposed person.

These were appropriate subjects for consideration in the District Court. The subject of the sale was a matter for that Court, and not being submitted there, the presumption is unquestionable that the orders and acts are all valid. The suit before the District Court consisted in the enforcement of a right of mortgage upon a particular property by causing the property for sale to pay the debt. This primary demand has been reduced to a judgment for a decree of sale and payment of the debt. The thing adjudged and the authority of that thing extends to the acts and the orders which are the direct consequence, and to the accessories which form an integral portion of the demand; and so that they are not to be collaterally impeached.

VI.

The plaintiff, Mrs. Johnson, prosecuted her suit successfully till the sale of the Richland plantation upon a credit of twelve months, subject to the payment of the sum bid at the sale according to the bond. The *bidder* was before the Court and might defend himself for a non-compliance, or might pay the debt for which he remained responsible. There was no mistake in reference to the debt, or to the identity of the property, or the liability of the parties. The bond contained a confession of the debt and the mortgage, and had the force of a judgment. The seizure and the sale annulled the title of the mortgagor as it existed on the day of its date. The accomplishment of the dissolving condition by the seizure and sale in 1866 had the effect to invalidate the charges imposed upon the property and to vacate the donation made by Ackley Perkins. Resoluto jure dantis, resolvitur jus accipientis. C. C., 1568–2045.

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